

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA, )  
PLAINTIFF, )  
VS. )  
ELIZABETH A. HOLMES, )  
DEFENDANT. )  
\_\_\_\_\_  
) CR-18-00258-EJD  
) SAN JOSE, CALIFORNIA  
) JULY 7, 2021  
) PAGES 1 - 79  
)

TRANSCRIPT OF ZOOM PROCEEDINGS  
BEFORE THE HONORABLE EDWARD J. DAVILA  
UNITED STATES DISTRICT JUDGE

## A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE  
BY: JOHN C. BOSTIC  
JEFFREY B. SCHENK  
150 ALMADEAN BOULEVARD, SUITE 900  
SAN JOSE, CALIFORNIA 95113

BY: ROBERT S. LEACH  
KELLY VOLKAR  
1301 CLAY STREET, SUITE 340S  
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

## A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP  
BY: KEVIN M. DOWNEY  
LANCE A. WADE  
KATHERINE TREFZ  
AMY SAHARIA  
RICHARD CLEARY  
725 TWELFTH STREET, N.W.  
WASHINGTON, D.C. 20005

LAW OFFICE OF JOHN D. CLINE  
BY: JOHN D. CLINE  
ONE EMBARCADERO CENTER, SUITE 500  
SAN FRANCISCO, CALIFORNIA 94111

1 SAN JOSE, CALIFORNIA

JULY 7, 2021

2 P R O C E E D I N G S

10:10AM 3 (COURT CONVENED AT 10:10 A.M.)

10:10AM 4 THE COURT: THANK YOU. GOOD MORNING EVERYONE.

10:10AM 5 LET'S CALL OUR MORNING MATTER. THIS IS 18-258,

10:10AM 6 UNITED STATES VERSUS ELIZABETH HOLMES.

10:10AM 7 LET ME FIRST GET APPEARANCES OF THE PARTIES, PLEASE.

10:10AM 8 WHO APPEARS FOR THE GOVERNMENT TODAY?

10:10AM 9 MR. BOSTIC: GOOD MORNING, YOUR HONOR.

10:10AM 10 JOHN BOSTIC FOR THE UNITED STATES ALONG WITH ROBERT LEACH,

10:10AM 11 JEFF SCHENK, AND KELLY VOLKAR.

10:10AM 12 THE COURT: THANK YOU. GOOD MORNING EVERYONE.

10:10AM 13 WHO APPEARS FOR THE DEFENDANT?

10:10AM 14 MS. SAHARIA: GOOD MORNING, YOUR HONOR.

10:11AM 15 THIS IS AMY SAHARIA FOR MS. HOLMES. WITH ME IS

10:11AM 16 KEVIN DOWNEY, LANCE WADE, KATHERINE TREFZ, JOHN CLINE.

10:11AM 17 I WILL NOTE THAT MY COLLEAGUE, RICH CLEARY, IS HERE IN

10:11AM 18 THIS ROOM WITH ME BUT IS NOT APPEARING ON VIDEO.

10:11AM 19 AND MS. HOLMES IS PRESENT. I SEE HER ON THE SCREEN.

10:11AM 20 WE DO HAVE A MECHANISM FOR COMMUNICATING WITH HER IF NEED

10:11AM 21 BE, AND SHE DOES CONSENT TO PROCEEDING REMOTELY TODAY.

10:11AM 22 THE COURT: THANK YOU. THANK YOU FOR THAT. GOOD  
10:11AM 23 MORNING EVERYONE.

10:11AM 24 THIS IS THE DATE AND TIME THAT WAS SET FOR THE MOTION.

10:11AM 25 THIS INVOLVES DOCKETS 810. IT'S PLAINTIFF'S -- EXCUSE ME --

10:11AM 1 ELIZABETH HOLMES'S MOTION TO SUPPRESS EVIDENCE. THERE'S AN  
10:11AM 2 OPPOSITION AT 846 AND A REPLY AT 850. THESE ARE ALL DOCKETS.  
10:11AM 3 I HAVE READ AND REVIEWED ALL OF THOSE DOCKETS, THE ATTACHMENTS  
10:12AM 4 AND REFERENCES THERETO.

10:12AM 5 ARE THERE ANY OTHER DOCUMENTS THAT COUNSEL WISH TO DRAW TO  
10:12AM 6 MY ATTENTION BEFORE WE GO FURTHER?

10:12AM 7 ANYTHING?

10:12AM 8 MS. SAHARIA: NO, YOUR HONOR.

10:12AM 9 I WOULD JUST NOTE THAT OUR MOTION DOES CROSS-REFERENCE OUR  
10:12AM 10 REPLY BRIEF IN SUPPORT OF OUR MOTION IN LIMINE TO EXCLUDE  
10:12AM 11 ANECDOTAL EVIDENCE AND THE EXHIBITS ATTACHED TO THAT REPLY  
10:12AM 12 BRIEF, AND SOME OF THOSE EXHIBITS MAY BE REFERENCED TODAY AS  
10:12AM 13 WELL.

10:12AM 14 THE COURT: ALL RIGHT. THANK YOU.

10:12AM 15 MR. BOSTIC: NO ADDITIONAL FILINGS FROM THE  
10:12AM 16 GOVERNMENT. THANK YOU, YOUR HONOR.

10:12AM 17 THE COURT: THANK YOU.

10:12AM 18 SO THIS IS A MOTION TO SUPPRESS FILED. THE FIRST THING I  
10:12AM 19 WANTED TO ASK IS ARE WE PAST THE DEADLINE TO FILE RULE 12  
10:12AM 20 MOTIONS TO SUPPRESS? HAS THAT COME AND GONE?

10:12AM 21 WHO WANTS TO ANSWER THAT? MR. BOSTIC?

10:12AM 22 MS. SAHARIA: SO, YOUR HONOR --

10:12AM 23 THE COURT: OH, YES, MS. SAHARIA. YES. THANK YOU.

10:12AM 24 MS. SAHARIA: YES. I'LL TAKE THAT.

10:12AM 25 SO, YOUR HONOR, THE DEADLINE FOR RULE 12 MOTIONS WAS IN

10:13AM 1 AUGUST OF 2020, BUT THAT MOTION -- THE DEADLINE FOR FILING  
10:13AM 2 RULE 12 MOTIONS APPLIES ONLY WHEN THE MOTION IS REASONABLY  
10:13AM 3 AVAILABLE AT THE TIME. THIS MOTION WAS NOT REASONABLY  
10:13AM 4 AVAILABLE AT THE TIME BECAUSE THE EVIDENCE ON WHICH IT IS BASED  
10:13AM 5 WAS NOT AVAILABLE TO THE DEFENSE OR PRODUCED AT THAT TIME.  
10:13AM 6 THE GOVERNMENT FIRST PRODUCED ITS BRADY LETTER DISCLOSING  
10:13AM 7 ITS RULE IN THE LOSS OF LIS ONLY IN OCTOBER OF 2020 AND MUCH OF  
10:13AM 8 THE EVIDENCE ON WHICH THE MOTION IS BASED HAS BEEN TRICKLED OUT  
10:13AM 9 FROM THE GOVERNMENT IN THE MONTHS SINCE THEN.  
10:13AM 10 JUST TO GIVE ONE EXAMPLE, OR TWO EXAMPLES. WE LITIGATED  
10:13AM 11 THE MOTION TO EXCLUDE ANECDOTAL TEST RESULTS AT A TIME WHEN THE  
10:13AM 12 GOVERNMENT WAS WITHHOLDING SIGNIFICANT EVIDENCE RELATED TO ITS  
10:13AM 13 ROLE IN THE LOSS OF THE LIS DATABASE, WHICH IS WHY THE  
10:14AM 14 GOVERNMENT ITSELF WAS FORCED TO CONSENT TO OUR EXTENSION OF  
10:14AM 15 TIME TO FILE A REPLY BRIEF GIVEN ITS LATE PRODUCTION OF  
10:14AM 16 INFORMATION RELATED TO THESE EVENTS.  
10:14AM 17 JUST AS ANOTHER EXAMPLE, THE GOVERNMENT MADE ANOTHER  
10:14AM 18 PRODUCTION RELEVANT TO THIS MOTION ONLY IN MARCH OF THIS YEAR,  
10:14AM 19 ON MARCH 30TH, AND I WOULD NOTE THAT SOME OF THOSE DOCUMENTS  
10:14AM 20 HAVE BEEN IN THE GOVERNMENT'S POSSESSION SINCE DECEMBER.  
10:14AM 21 SO WHILE WE WERE LITIGATING THE REPLY BRIEF AND  
10:14AM 22 SUPPORTIVE -- OR THE ANECDOTAL EVIDENCE MOTION, THE GOVERNMENT  
10:14AM 23 WAS WITHHOLDING DOCUMENTS RELEVANT TO THESE ISSUES.  
10:14AM 24 SO WE THINK THIS MOTION WAS NOT REASONABLY AVAILABLE BACK  
10:14AM 25 IN AUGUST OF 2020. EVEN IF IT WAS, WE THINK THESE EVENTS

10:14AM 1 SURELY CONSTITUTE GOOD CAUSE FOR FILING THE MOTION NOW. AND AS  
10:14AM 2 YOU KNOW, YOUR HONOR, WE MOVED TO EXCLUDE THE GOVERNMENT'S  
10:14AM 3 ANECDOTAL EVIDENCE UNDER THE RULES OF EVIDENCE.

10:15AM 4 THE COURT RULED ON THAT MOTION ONLY IN MAY FOLLOWING THE  
10:15AM 5 MAY HEARING. WE DID PREVIEW, AS WE WERE LITIGATING THOSE  
10:15AM 6 ISSUES, THAT IF THIS EVIDENCE WERE TO BE DEEMED RELEVANT, THAT  
10:15AM 7 WOULD RAISE DUE PROCESS CONCERNs. THOSE DUE PROCESS CONCERNs  
10:15AM 8 ARE NOW RIPE, WHICH IS WHY WE FILED THE MOTION NOW.

10:15AM 9 AND JUST AS A FINAL POINT ON THIS, YOUR HONOR, THE  
10:15AM 10 GOVERNMENT CLAIMS THAT THE MOTION IS UNTIMELY ONLY IN A  
10:15AM 11 FOOTNOTE OF THEIR BRIEF. I THINK IT'S WELL ESTABLISHED THAT  
10:15AM 12 FOOTNOTES ARE NOT SUFFICIENT TO PRESERVE AN ISSUE, AND I THINK  
10:15AM 13 IF THE GOVERNMENT REALLY THOUGHT THE MOTION WAS UNTIMELY, YOU  
10:15AM 14 WOULD EXPECT THAT ARGUMENT TO BE FULLY PRESENTED TO THE COURT,  
10:15AM 15 WHICH IT WAS NOT.

10:15AM 16 THE COURT: ALL RIGHT. THANK YOU.

10:15AM 17 MR. BOSTIC, DO YOU WISH TO BE HEARD?

10:15AM 18 MR. BOSTIC: YES, YOUR HONOR. THANK YOU. JUST  
10:15AM 19 BRIEFLY.

10:15AM 20 ON THE LAST POINT, THE GOVERNMENT CHOSE TO MEET THIS  
10:15AM 21 MOTION ON THE MERITS BECAUSE I THINK, AS WE'LL SEE SHORTLY, THE  
10:15AM 22 GOVERNMENT HAS THE STRONGER ARGUMENT ON THE LAW AND THE FACTS,  
10:15AM 23 BUT ON THE PROCEDURAL POINT, THE GOVERNMENT DOESN'T AGREE THAT  
10:16AM 24 THIS MOTION IS TIMELY.

10:16AM 25 THE KEY FACTS THAT WOULD HAVE PUT THE DEFENSE ON NOTICE OF

10:16AM 1 THE CAUSE FOR BRINGING THIS MOTION OR WOULD HAVE LED THE  
10:16AM 2 DEFENSE TO KNOW THAT SUCH A MOTION WAS POSSIBLE OR COLORABLE  
10:16AM 3 WERE KNOWN TO THE DEFENSE LONG BEFORE THIS MOTION WAS FILED.  
10:16AM 4 THE GOVERNMENT HAS CONTINUED TO COLLECT EVIDENCE RELEVANT  
10:16AM 5 TO THESE ISSUES AS PART OF ITS ONGOING INVESTIGATION AND HAS  
10:16AM 6 PRODUCED THOSE MATERIALS, SOME OF THEM SUBSEQUENT TO THE MOTION  
10:16AM 7 FILING DEADLINE FOR WHICH RULE 12 MOTIONS, BUT THE KEY FACTS  
10:16AM 8 THE GOVERNMENT CONTENDS WERE KNOWN TO THE DEFENSE LONG BEFORE.  
10:16AM 9 THE GOVERNMENT ALSO DISAGREES WITH THE ARGUMENT THAT THE  
10:16AM 10 COURT'S MOTION IN LIMINE RULING SOMEHOW RIPENED THIS MOTION.  
10:16AM 11 THESE ARGUMENTS COULD HAVE BEEN BROUGHT IN PARALLEL TO OR  
10:16AM 12 PREVIOUS TO THE COURT'S MOTION IN LIMINE ADJUDICATIONS.  
10:16AM 13 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK  
10:16AM 14 YOU FOR THAT. I WANT TO GET CLARIFICATION OF THE PARTY'S  
10:16AM 15 POSITIONS ON THAT.  
10:17AM 16 AND BECAUSE WE ARE ALL HERE, I THINK WE SHOULD GO FORWARD  
10:17AM 17 WITH THIS MOTION. LET ME JUST TELL YOU, I'VE READ YOUR  
10:17AM 18 PLEADINGS, AND I APPRECIATE YOUR AUGMENTATION OF THOSE TODAY.  
10:17AM 19 MY INTENT IS TO LISTEN TO WHAT YOU HAVE TO SAY AND MOST  
10:17AM 20 LIKELY WE'LL TAKE THE MOTION UNDER SUBMISSION AND YOU'LL GET AN  
10:17AM 21 ORDER OUT SHORTLY THEREAFTER.  
10:17AM 22 SO LET ME START THEN. MS. SAHARIA, ARE YOU SPEAKING ON  
10:17AM 23 THE MOTION?  
10:17AM 24 MS. SAHARIA: YES, I AM, YOUR HONOR.  
10:17AM 25 THE COURT: ALL RIGHT. THANK YOU. WHAT WOULD YOU

10:17AM 1 LIKE ME TO KNOW?

10:17AM 2 MS. SAHARIA: YOUR HONOR, LET ME COVER I THINK FOUR

10:17AM 3 TOPICS IN THIS PRESENTATION. I'LL START WITH JUST A FEW

10:17AM 4 INTRODUCTORY REMARKS ABOUT THE MOTION TO PUT THE REST IN

10:17AM 5 FRAMING. I'LL TOUCH ON A FEW OF THE LEGAL ISSUES THAT I THINK

10:17AM 6 ARISE OUT OF THE PARTY'S BRIEFS, AND THEN I WANT TO SPEND THE

10:17AM 7 BULK OF THE ARGUMENT ON WHAT WE THINK ARE THE KEY DISPUTED

10:17AM 8 FACTS THAT REQUIRE A HEARING, AND THEN I'LL JUST TOUCH AT THE

10:18AM 9 VERY END ON THE MOTION TO COMPEL THAT ACCOMPANIES THE MOTION TO

10:18AM 10 SUPPRESS.

10:18AM 11 SO JUST TO BEGIN, I JUST WANT TO MAKE CLEAR THAT AT THIS

10:18AM 12 JUNCTION THE QUESTION BEFORE THE COURT IS SIMPLY WHETHER TO

10:18AM 13 HOLD AN EVIDENTIARY HEARING. WE DO THINK THAT THE CURRENT

10:18AM 14 RECORD SUFFICES TO REQUIRE SUPPRESSION, BUT THE COURT NEED NOT

10:18AM 15 MAKE THAT DECISION TODAY OR IN DECIDING THE MOTION AS IT

10:18AM 16 CURRENTLY STANDS.

10:18AM 17 THE COURT NEED ONLY HOLD FOR PRESENT PURPOSES THAT THE

10:18AM 18 MOTION RAISES AN ISSUE OF FACT, OF DISPUTED FACTS RELATED TO

10:18AM 19 WHETHER TO SUPPRESS EVIDENCE OR WHETHER TO IMPOSE SOME SORT OF

10:18AM 20 SANCTION FOR THE LOSS OF THIS EVIDENCE, AND THEN PROCEED TO

10:18AM 21 HOLD A HEARING AT WHICH POINT THE COURT CAN THEN MAKE ITS FINAL

10:18AM 22 DECISION BASED ON THE FULL RECORD DEVELOPED AT THAT HEARING.

10:18AM 23 THE QUESTION WITH RESPECT TO WHETHER TO HOLD A HEARING IS

10:18AM 24 WHETHER WE HAVE ALLEGED FACTS WITH SUFFICIENT DEFINITENESS,

10:18AM 25 CLARITY, AND SPECIFICITY TO ENABLE THE COURT TO DETERMINE THAT

10:19AM 1 CONTESTED ISSUES OF FACT EXIST, AND WE SUBMIT THAT WE HAVE MET  
10:19AM 2 THAT REQUIREMENT EASILY WITH RESPECT TO BOTH OF THE LEGAL  
10:19AM 3 THEORIES THAT ARE PRESENTED IN THE MOTION.

10:19AM 4 AS YOUR HONOR I'M SURE IS AWARE, THE MOTION PRESENTS TWO  
10:19AM 5 DIFFERENT THEORIES FOR SUPPRESSING EVIDENCE OR FOR IMPOSING  
10:19AM 6 SOME SORT OF SANCTION IN CASES OF LOSS OF EVIDENCE. THE HIGHER  
10:19AM 7 STANDARD IS THE DUE PROCESS STANDARD.

10:19AM 8 BUT IN THE NINTH CIRCUIT THERE IS A LESSER STANDARD, THE  
10:19AM 9 LOUD HAWK STANDARD, THAT REQUIRES SANCTIONS IN CASES OF  
10:19AM 10 GOVERNMENT LOSS OF EVIDENCE AND PURSUANT TO A BALANCING TEST,  
10:19AM 11 AND THAT IS -- THAT STANDARD GOVERNS LESSER SANCTIONS SUCH AS  
10:19AM 12 SUPPRESSION AND IT IS A LESSER STANDARD.

10:19AM 13 SO AT THIS POINT THE COURT NEED ONLY CONCLUDE THAT THERE  
10:19AM 14 ARE DISPUTED ISSUES OF FACT THAT GO TO THAT BALANCING TEST TO  
10:19AM 15 PROCEED FORWARD TO A HEARING AT WHICH POINT WE EXPECT THE  
10:19AM 16 RECORD WILL SHOW THAT WE ARE ENTITLED TO SUPPRESSION OR OTHER  
10:20AM 17 SANCTIONS BOTH UNDER LOUD HAWK AND UNDER THE DUE PROCESS  
10:20AM 18 CLAUSE.

10:20AM 19 NOW, THE STANDARD FOR HOLDING A HEARING IS NOT TERRIBLY  
10:20AM 20 DEMANDING. THE COURT -- THE GOVERNMENT HAS CITED TO THE COURT  
10:20AM 21 A NUMBER OF CASES IN WHICH COURTS HAVE DENIED SUPPRESSION AND  
10:20AM 22 CASES OF FAILURE TO COLLECT OR PRESERVE EVIDENCE, BUT I WOULD  
10:20AM 23 NOTE THAT IN MANY OF THOSE CASES THE COURT DID HOLD AN  
10:20AM 24 EVIDENTIARY HEARING AND CONCLUDED THAT SUPPRESSION WAS NOT  
10:20AM 25 REQUIRED ONLY BASED ON THE FACTS THAT WERE DEVELOPED AT THAT

10:20AM 1 HEARING. THOSE CASES INCLUDE LOUD HAWK, ROBERTSON, GIBSON,

10:20AM 2 BROWN, AND HINKSON. IN ALL OF THOSE CASES THE COURT DID HOLD A

10:20AM 3 HEARING.

10:20AM 4 NOW, WE SUBMIT THAT THIS CASE IS FUNDAMENTALLY DIFFERENT

10:20AM 5 FROM THE CASES ON WHICH THE GOVERNMENT IS RELYING. THE TYPICAL

10:20AM 6 CASE WHERE SUPPRESSION IS DENIED IS A CASE WHERE AN AGENT OUT

10:20AM 7 IN THE FIELD FAILS TO COLLECT EVIDENCE SUCH AS, LET'S SAY, A

10:20AM 8 BLOOD SAMPLE IN ORDER TO SUBJECT IT TO TESTS HAVING NO REASON

10:21AM 9 TO BELIEVE AT THE TIME THAT THOSE TESTS WOULD HAVE ANY

10:21AM 10 EXONERATORY VALUE TO THE DEFENDANT.

10:21AM 11 AND IN A TYPICAL CASE WHERE SUPPRESSION IS DENIED, THE

10:21AM 12 AGENT WAS TYPICALLY FOLLOWING ROUTINE GOVERNMENT PROCEDURES IN

10:21AM 13 DECIDING NOT TO COLLECT THAT EVIDENCE, OR MAYBE AT WORST IT WAS

10:21AM 14 A MERE OVERSIGHT BY WHICH THAT EVIDENCE WAS NOT COLLECTED.

10:21AM 15 I THINK IT'S CLEAR FROM THE RECORD THAT THIS IS NOT THAT

10:21AM 16 TYPICAL CASE. I WANT TO TALK IN MORE DETAIL ABOUT THE ACTUAL

10:21AM 17 EVIDENCE IN A LITTLE BIT, BUT LET ME JUST START WITH THREE

10:21AM 18 GENERAL OBSERVATIONS ABOUT THIS CASE.

10:21AM 19 FIRST, AT THE TIME OF THE EVENTS IN QUESTION, THE

10:21AM 20 GOVERNMENT UNQUESTIONABLY KNEW THAT AT THE LIS DATABASE WAS THE

10:21AM 21 MOST RELIABLE AND COMPREHENSIVE SET OF INFORMATION ABOUT

10:21AM 22 THERANOS'S TEST RESULTS, AND IT KNEW THAT THAT DATABASE HAD

10:21AM 23 EXONERATORY VALUE GOING TO A CENTRAL ISSUE IN THE CASE.

10:21AM 24 SECOND, THE LOSS OF THE EVIDENCE IS NOT THE RESULT OF

10:21AM 25 STANDARD GOVERNMENT PROCEDURES OR EVEN OVERSIGHT. THE

10:22AM 1 GOVERNMENT'S CONDUCT IN THIS CASE WAS SO UNUSUAL THAT IT FELT  
10:22AM 2 COMPELLED TO WRITE A 23-PAGE BRADY LETTER TO THE DEFENSE  
10:22AM 3 DESCRIBING ITS FAILURE TO PRESERVE THE LIS.  
10:22AM 4 THE EVIDENCE TO DATE, WHICH TODAY IS STILL INCOMPLETE, BUT  
10:22AM 5 THE EVIDENCE TO DATE SUGGESTS THAT PROSECUTORS, THE PROSECUTORS  
10:22AM 6 PROSECUTING THIS CASE REPEATEDLY DISREGARDED ADVICE FROM THEIR  
10:22AM 7 OWN SUPPORT STAFF REGARDING STEPS THAT THEY SHOULD TAKE TO  
10:22AM 8 ACCESS AND PRESERVE THE LIS DATABASE.  
10:22AM 9 THE COURT: MS. SAHARIA, AT THE TIME THAT THEY  
10:22AM 10 DISREGARDED, ACCORDING TO THE DOCUMENTS THAT I'VE READ, AT THE  
10:22AM 11 TIME THAT THEY DISREGARDED THE ADVICE OF THEIR EXPERTS AS YOU  
10:22AM 12 SUGGEST, THE LIS WAS DESTROYED, WASN'T IT?  
10:22AM 13 MS. SAHARIA: WELL, NOT EXACTLY, YOUR HONOR.  
10:22AM 14 I THINK IT'S IMPORTANT TO KEEP IN MIND THAT THERE'S REALLY  
10:22AM 15 TWO SOURCES OF DATA THAT ARE RELEVANT TO THIS DISCUSSION.  
10:23AM 16 THERE IS THE LIS DATABASE.  
10:23AM 17 THE COURT: SURE. WELL, LET ME TELL YOU WHAT I'M  
10:23AM 18 TALKING ABOUT SO YOU UNDERSTAND.  
10:23AM 19 MS. SAHARIA: SURE.  
10:23AM 20 THE COURT: SO AS I UNDERSTAND IT THE LIS WAS  
10:23AM 21 CREATED, AND MAYBE WE'LL TALK A LITTLE BIT MORE ABOUT THE  
10:23AM 22 GENESIS OF THAT CREATION, BUT IT WAS CREATED. IT CONTAINED ALL  
10:23AM 23 OF THIS INFORMATION. IT WAS IN THE CUSTODIAL POSSESSION OF  
10:23AM 24 THERANOS. THEY HAD IT ON SIGHT, OR SOMEWHERE, THE SERVERS WERE  
10:23AM 25 THERE, AND THEN AT THE DEMISE OF THERANOS THE -- I SUPPOSE IT

10:23AM 1 WAS GOING TO BE DECONSTRUCTED, THAT IS, THE SERVERS. IT SOUNDS  
10:23AM 2 LIKE THE SERVERS MAY HAVE BEEN LEASED OR SOMETHING, BUT THEY  
10:23AM 3 WERE TAKEN APART, AND THEY WERE GOING TO BE DECONSTRUCTED SUCH  
10:23AM 4 THAT THE LIS AS IT EXISTED WOULD NO LONGER EXIST AND IT'S A  
10:23AM 5 FIRST ITERATION SHALL I SAY.  
10:24AM 6 MS. SAHARIA: SURE. SO LET ME --  
10:24AM 7 THE COURT: SO DIDN'T A COPY OF THAT, WHEN THE  
10:24AM 8 GOVERNMENT RECEIVED A COPY IN AUGUST -- I THINK IT WAS AUGUST  
10:24AM 9 27TH, WAS IT? IS THAT WHEN THEY RECEIVED THEIR COPY?  
10:24AM 10 MS. SAHARIA: YES, YOUR HONOR, IT WAS IN AUGUST OF  
10:24AM 11 2018.  
10:24AM 12 THE COURT: YES.  
10:24AM 13 AND THEN FOUR DAYS LATER THERANOS CAUSED THE DEMISE OF THE  
10:24AM 14 SERVERS, AND WHOEVER WAS IN CHARGE CAUSED THE DEMISE OF THE  
10:24AM 15 SERVERS SUCH THAT THEY DID MAKE A COPY OF IT, AND THEY SENT IT  
10:24AM 16 TO THE GOVERNMENT.  
10:24AM 17 AND THEN FOUR DAYS LATER IT WAS DESTROYED, IF YOU WILL.  
10:24AM 18 IT WAS DECOMMISSIONED I GUESS IS THE WORD, AND THE GOVERNMENT  
10:24AM 19 DID NOT DECOMMISSION IT. THE GOVERNMENT DIDN'T REQUEST IT TO  
10:24AM 20 BE DECOMMISSIONED. THAT WAS A UNILATERAL DECISION THAT WAS  
10:24AM 21 MADE BY THERANOS.  
10:24AM 22 AS I UNDERSTAND IT FROM THE DOCUMENTS I'VE READ, THAT THAT  
10:24AM 23 DATE, THAT DECOMMISSIONING DATE WAS NOT PROVIDED TO THE  
10:24AM 24 GOVERNMENT AT THE TIME THAT THE GOVERNMENT RECEIVED THE  
10:24AM 25 DATABASE FROM THERANOS. THAT'S WHAT I UNDERSTAND AT LEAST FROM

10:25AM 1 THE DOCUMENTS THAT YOU FILED.

10:25AM 2 I DON'T THINK YOU QUARREL WITH THE FACT THAT THE

10:25AM 3 GOVERNMENT DID NOT DESTROY THIS OR DECOMMISSION. THAT WAS DONE

10:25AM 4 BY WHOEVER WAS IN CHARGE OF THERANOS.

10:25AM 5 AND I DON'T THINK YOU QUARRELLED WITH THE FACT THAT THE

10:25AM 6 GOVERNMENT WAS NOT GIVEN NOTICE OF THE DECOMMISSION DATE. I

10:25AM 7 DON'T THINK YOU QUARREL WITH THAT.

10:25AM 8 THEN THE OTHER QUESTION I HAD IS APPARENTLY WHEN THE

10:25AM 9 GOVERNMENT RECEIVED WHAT THEY THOUGHT WAS A MIRROR IMAGE OF THE

10:25AM 10 DATABASE, THEY WERE NOT TOLD THAT A MISSING KEY, I GUESS THEY

10:25AM 11 CALL IT, TO ACCESS THE DATABASE WAS MISSING.

10:25AM 12 THEY WERE GIVEN A PASSWORD, AN ENCRYPTED PASSWORD THAT

10:25AM 13 WOULD ALLOW THEM TO OPEN THE DATABASE, BUT AT THE TIME THAT IT

10:25AM 14 WAS DELIVERED FROM THE LAWYERS, THE LAWYERS KNEW THAT THERE WAS

10:26AM 15 A KEY THAT WOULD NEED TO BE USED TO ACCESS THE MATERIAL. THAT

10:26AM 16 WAS NOT PROVIDED IN THE DATABASE THAT WAS GIVEN TO THE

10:26AM 17 GOVERNMENT.

10:26AM 18 AND SO THE GOVERNMENT -- IN ESSENCE WHAT THEY WERE GIVEN

10:26AM 19 WAS A NONWORKING COPY, IF YOU WILL, OF THE DATABASE. IN OTHER

10:26AM 20 WORDS, THEY COULDN'T ACCESS IT. EVEN IF THEY HAD TRIED TO

10:26AM 21 ACCESS IT IN THE PARKING LOT ONCE THEY RECEIVED IT, THEY

10:26AM 22 WOULDN'T HAVE BEEN ABLE TO.

10:26AM 23 IS THAT THE STATE OF THINGS?

10:26AM 24 MS. SAHARIA: WELL, I, I, I -- SOME OF THAT IS

10:26AM 25 CORRECT, YOUR HONOR, BUT I THINK THERE ARE INFERENCES DRAWN

10:26AM 1 FROM THOSE FACTS THAT REQUIRE AN EVIDENTIARY HEARING.

10:26AM 2 SO LET ME TAKE THOSE TWO PIECES OF FACTS IN TURN. ONE,

10:26AM 3 THE LIS SERVER, THE PHYSICAL SERVER; AND THEN, TWO, THE COPY OF

10:26AM 4 THE LIS.

10:26AM 5 SO WITH RESPECT TO THE LIS SERVER, YES, YOUR HONOR IS

10:27AM 6 CORRECT THAT THE SERVER -- I DON'T THINK THE CORRECT WORD IS

10:27AM 7 DESTROYED. IT'S NOT AS THOUGH SOMEONE TOOK A HAMMER TO THE

10:27AM 8 SERVER AND, YOU KNOW, CRUSHED IT TO PIECES OUT IN THE PARKING

10:27AM 9 LOT.

10:27AM 10 THE GOVERNMENT KNEW FULL KNOW THAT THERANOS WAS CLOSING,

10:27AM 11 IT WAS PHYSICALLY CLOSING ITS OFFICE BUILDING, AND WHEN A

10:27AM 12 BUILDING CLOSES, THAT REQUIRES TAKING THE THINGS IN THE

10:27AM 13 BUILDING AND MOVING THEM.

10:27AM 14 WHAT THE GOVERNMENT APPRECIATED ABOUT WHAT THAT MEANT FOR

10:27AM 15 THE PHYSICAL LIS SERVER WOULD BE AN ISSUE TO EXPLORE AT THE

10:27AM 16 HEARING, BUT IT'S UNDISPUTED THE GOVERNMENT WAS FULL AWARE THAT

10:27AM 17 THERANOS WAS CLOSING AND YET IT WAITED A YEAR AND A HALF UNTIL

10:27AM 18 THE EVE OF THE COMPANY CLOSING TO REQUEST THE DATABASE.

10:27AM 19 THE COURT: WELL, THERE WERE NEGOTIATIONS, WEREN'T

10:27AM 20 THERE? WASN'T THE GOVERNMENT AND LAWYERS FOR THERANOS IN

10:27AM 21 NEGOTIATION ABOUT -- I MEAN, THERE WAS A TROVE OF EVIDENCE THAT

10:28AM 22 WAS BEING SOUGHT NOT ONLY FROM -- WHEN I SAY "THE GOVERNMENT" I

10:28AM 23 MEAN THIS PROSECUTION.

10:28AM 24 BUT THERE WAS ALSO LETTERS AND DOCUMENTATION FROM THE

10:28AM 25 S.E.C. AND SUBPOENAS FROM THE S.E.C. EARLIER. WAS IT IN 2016

10:28AM 1 PERHAPS? '15? THERE WERE SUBPOENAS THAT WERE REQUESTING -- IT  
10:28AM 2 SEEMED LIKE THE SAME TYPE OF INFORMATION WHEN WE LOOK AT THE  
10:28AM 3 SUBPOENAS. THEY TALK ABOUT -- THE S.E.C. SUBPOENAS TALK ABOUT  
10:28AM 4 ALL THE INFORMATION REGARDING -- INFORMATION THAT COULD BE ON  
10:28AM 5 THE LIS I SUPPOSE.

10:28AM 6 BUT IN ANY EVENT, THERE WERE NEGOTIATIONS BETWEEN THE  
10:28AM 7 PROSECUTION, THE GOVERNMENT PROSECUTION IN THIS CASE AND THE  
10:28AM 8 ATTORNEYS FOR THERANOS ABOUT RECEIVING INFORMATION. WASN'T  
10:28AM 9 THAT ONGOING?

10:28AM 10 MS. SAHARIA: WELL, TO BE SURE, THE GOVERNMENT WAS  
10:28AM 11 REQUESTING CERTAIN SUBSETS OF DATA THAT RESIDED IN THE LIS, BUT  
10:28AM 12 THE FIRST TIME THAT THE GOVERNMENT SUBPOENAED THE LIS DATABASE  
10:28AM 13 ITSELF WITH THE FULL ARRAY OF INFORMATION IN THE DATABASE WAS  
10:28AM 14 ON JUNE 14TH, 2018, WHICH WAS ONLY TWO WEEKS BEFORE IT RETURNED  
10:29AM 15 THE INDICTMENT IN THIS CASE AND AT A TIME WHEN IT KNEW FULL  
10:29AM 16 WELL THAT THERANOS WAS ABOUT TO CLOSE.

10:29AM 17 THE COURT: WELL, IT WAS JUNE 4TH.

10:29AM 18 WAS IT JUNE 4TH AND THEN THE INDICTMENT WAS JUNE 14TH? I  
10:29AM 19 CAN'T REMEMBER THE DATES, BUT IT WAS AROUND THAT SAME TIME  
10:29AM 20 PERIOD. I THINK YOU'RE CORRECT.

10:29AM 21 MS. SAHARIA: YES. I THINK IT WAS JUNE 4TH AND  
10:29AM 22 JUNE 18TH, BUT IT'S AROUND THOSE PRECISE DATES, YOUR HONOR.

10:29AM 23 THE COURT: RIGHT.

10:29AM 24 MS. SAHARIA: WITH RESPECT TO THE DATABASE ITSELF,  
10:29AM 25 IT IS CERTAINLY TRUE THAT WHEN THE COMPANY CLOSED, IT HAD NO

10:29AM 1 CHOICE BUT TO MOVE THE PHYSICAL SERVERS TO A DIFFERENT  
10:29AM 2 LOCATION. MY UNDERSTANDING IS I THINK THEY WERE INITIALLY  
10:29AM 3 TRANSFERRED TO THE ASSIGNEE AND THEN AT SOME POINT RETURNED TO  
10:29AM 4 THE LESSOR OF THAT EQUIPMENT.

10:29AM 5 AND IT IS, I THINK, CORRECT THAT ONCE THAT PHYSICAL MOVING  
10:29AM 6 OF THE SERVERS OCCURRED, BECAUSE THEY HAD TO BE, YOU KNOW,  
10:29AM 7 DISCONNECTED FROM EACH OTHER, THAT IS WHAT THE GOVERNMENT  
10:30AM 8 CALLED THE DECOMMISSIONING OF THE LIS DATABASE.

10:30AM 9 BUT THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD FROM  
10:30AM 10 WITNESSES THAT THE GOVERNMENT HAS INTERVIEWED AND THESE ARE  
10:30AM 11 AT -- LET ME MAKE SURE THAT I GIVE THE COURT THE CORRECT  
10:30AM 12 EXHIBIT NUMBERS, THESE ARE -- HOLD ON. THESE ARE DEFENSE  
10:30AM 13 EXHIBITS 10, 11, AND 13, WITNESSES HAVE SAID THAT IT WOULD HAVE  
10:30AM 14 CERTAINLY HAVE BEEN POSSIBLE TO RECONSTRUCT THE DATABASE USING  
10:30AM 15 THE PHYSICAL SERVERS WITH SOME AMOUNT OF EFFORT. PERHAPS OVER  
10:30AM 16 A MONTH IT COULD HAVE BEEN RECONSTRUCTED USING THE PHYSICAL  
10:30AM 17 EQUIPMENT. THAT IS ONE OF THE AVENUES THAT THE GOVERNMENT  
10:30AM 18 SUPPORT STAFF RECOMMENDED TO THE GOVERNMENT, THAT IT ACTUALLY  
10:30AM 19 SEIZE THE PHYSICAL SERVERS AND USE THE PHYSICAL SERVERS TO GET  
10:30AM 20 ACCESS TO THE LIS DATA. THAT IS SOMETHING THAT THE GOVERNMENT  
10:31AM 21 WAS DOING IN FACT. BEFORE THERANOS CLOSED, IT ROLLED UP THE  
10:31AM 22 TRUCKS TO THE COMPANY'S PHYSICAL LOCATION AND TOOK OTHER  
10:31AM 23 PHYSICAL EQUIPMENT FROM THERANOS, BUT IT DIDN'T DO THAT FOR THE  
10:31AM 24 LIS DATABASE.

10:31AM 25 THE COURT: AND THAT'S BECAUSE IT SEEMED LIKE FROM

10:31AM 1 THE RECORD IN SOME OF THE DOCUMENTATION THAT THERE WERE ONGOING  
10:31AM 2 NEGOTIATIONS BETWEEN COUNSEL FOR THERANOS AND THE GOVERNMENT.  
10:31AM 3 THERE WERE EMAILS THAT SUGGESTED -- THIS IS IN THE BRADY  
10:31AM 4 LETTER, I THINK, THAT YOU MENTIONED. IT'S PROBABLY  
10:31AM 5 EXHIBIT 732-2, PARAGRAPHS 31, 34, 36, SOME OF THOSE PARAGRAPHS  
10:31AM 6 IN THERE. PARDON ME, I DON'T HAVE THEM AT MY FINGERTIPS  
10:31AM 7 EXACTLY. BUT THEY SUGGEST THAT THERE WAS AN EXCHANGE OF  
10:31AM 8 INFORMATION, VERY CORDIAL, BETWEEN THE GOVERNMENT AND I THINK  
10:31AM 9 IT WAS WILMER HALE ATTORNEYS WHO WERE IN CHARGE AT THAT TIME OF  
10:31AM 10 NEGOTIATING THIS EXCHANGE OF INFORMATION.  
10:31AM 11 IT APPEARS THAT SOME OF THESE EMAILS SAID THE TRUCKS WILL  
10:31AM 12 BE HERE. WILMER HALE SAID, WE'LL TELL YOU THE SIZE OF WHAT  
10:32AM 13 YOU'RE COLLECTING SO YOU CAN ORGANIZE THE RIGHT TRUCKS,  
10:32AM 14 CORRECT TRUCKS, AND GET THE RIGHT SIZE OF TRUCKS TO TAKE THINGS  
10:32AM 15 AWAY. BUT THERE WAS NEVER DISCUSSION, YOU'RE RIGHT, ABOUT THE  
10:32AM 16 SERVERS. THOSE WERE STILL CONNECTED, STILL ONLINE.  
10:32AM 17 AND IT SEEMED LIKE CONCURRENT WITH THAT THE CONVERSATION  
10:32AM 18 WAS ONGOING WITH THE GOVERNMENT ABOUT HOW TO GET THE LIS.  
10:32AM 19 AND THEN ON AUGUST 27TH I THINK THERE WAS AN EMAIL --  
10:32AM 20 PARDON ME. LET ME BACKTRACK A MOMENT. I THINK THERE WAS AN  
10:32AM 21 EARLIER EMAIL FROM MR. BOSTIC THAT SAID, HEY, I'M JUST CHECKING  
10:32AM 22 IN ON WHEN CAN WE GET THE DATABASE? I'M WORKING WITH THERANOS  
10:32AM 23 TO GET THAT FOR YOU WAS THE RESPONSE FROM WILMER.  
10:32AM 24 AND THEN IT'S READY FOR YOU AUGUST 27TH, COME GET IT.  
10:32AM 25 AND THEN FOUR DAYS LATER THEY DECOMMISSION, THEY, SOMEONE.

10:32AM 1 LET ME JUST BE CLEAR, I DON'T KNOW WHO DECOMMISSIONED IT, BUT  
10:32AM 2 CAN WE AGREE THAT THE GOVERNMENT DID NOT DECOMMISSION THE  
10:32AM 3 DATABASE?

10:32AM 4 MS. SAHARIA: OF COURSE, YOUR HONOR. THE GOVERNMENT  
10:32AM 5 WAS NOT THERE AT THERANOS DISCONNECTING THE WIRES.

10:33AM 6 THE GOVERNMENT DID KNOW THAT THERANOS WAS CLOSING. AND  
10:33AM 7 IT, AND IT, IT DID KNOW THAT, YOU KNOW, RELATIVELY SOON  
10:33AM 8 THEREAFTER THAT ITS SUPPORT STAFF WERE RECOMMENDING THAT IT  
10:33AM 9 ATTEMPT TO GET THE PHYSICAL HARDWARE, AND IT DIDN'T DO THAT.

10:33AM 10 NOW, LET ME TALK ABOUT THE COPY OF THE LIS THAT WAS  
10:33AM 11 PRODUCED TO THE GOVERNMENT ON AUGUST 27TH.

10:33AM 12 THE GOVERNMENT HAS REPRESENTED THAT IT NEEDS -- THAT THAT  
10:33AM 13 WAS PRODUCED WITHOUT A PASSWORD AND THAT IT CAN'T ACCESS THE  
10:33AM 14 DATABASE WITHOUT A PASSWORD.

10:33AM 15 IT SAYS IN ITS OPPOSITION THAT -- THIS IS AT PAGE 6, THAT  
10:33AM 16 ITS EFFORTS TO ACCESS THAT COPY OF THE LIS DATABASE HAVE  
10:33AM 17 FAILED, BUT THEY PROVIDE PRECIOUS LITTLE EVIDENCE OF WHAT THOSE  
10:33AM 18 EFFORTS ACTUALLY WERE OR IMPORTANTLY WHEN THEY OCCURRED.

10:33AM 19 AND I WILL NOTE THAT UNDER THE LOUD HAWK BALANCING TEST IT  
10:34AM 20 IS THE GOVERNMENT'S DUTY TO JUSTIFY THE REASONABLENESS OF ITS  
10:34AM 21 CONDUCT AND TO COME FORWARD WITH EVIDENCE JUSTIFYING ITS  
10:34AM 22 CONDUCT.

10:34AM 23 AND THE REASON IT HASN'T COME FORWARD WITH THAT EVIDENCE,  
10:34AM 24 I WOULD SUBMIT, IS BECAUSE THE ACTUAL EVIDENCE IS QUITE  
10:34AM 25 DAMAGING TO THE GOVERNMENT ON THIS POINT. IT RECEIVED THAT

10:34AM 1 COPY OF THE LIS DATABASE AS YOUR HONOR INDICATED IN LATE AUGUST  
10:34AM 2 OF 2018 AT A TIME WHEN IT KNEW THAT THE COMPANY WAS ABOUT TO  
10:34AM 3 CLOSE.

10:34AM 4 NOW, THE FIRST THING THAT WE ALWAYS DO WHEN WE OBTAIN A  
10:34AM 5 PRODUCTION FROM THE GOVERNMENT IS WE OPEN IT AND WE CHECK IT  
10:34AM 6 BECAUSE THERE ARE OFTEN TECHNICAL GLITCHES ASSOCIATED WITH  
10:34AM 7 PRODUCTIONS, MISSING PASSWORDS, OR DATA THAT IS CORRUPTED OR  
10:34AM 8 WHAT HAVE YOU, AND THE REASON FOR THAT IS TO MAKE SURE THAT YOU  
10:34AM 9 PROMPTLY CAN CORRECT ANY PROBLEM.

10:34AM 10 THE GOVERNMENT DIDN'T DO THAT. IT TOOK THREE WEEKS TO  
10:34AM 11 ACCESS THE HARD DRIVE, EVEN THOUGH THERANOS WAS IMMINENTLY  
10:34AM 12 CLOSING. THIS IS AT THE BRADY LETTER WHICH IS EXHIBIT 88 TO  
10:35AM 13 OUR ANECDOTAL EVIDENCE REPLY BRIEF, PARAGRAPHS 36 TO 43.

10:35AM 14 AND THEN IT TOOK TWO AND A HALF WEEKS FOR THE SUPPORT  
10:35AM 15 PERSONNEL TO RELAY TO THE PROSECUTORS THAT THEY DIDN'T HAVE THE  
10:35AM 16 RIGHT SOFTWARE TO PROCESS IT. THAT'S EXHIBIT 88, PARAGRAPH 46.  
10:35AM 17 NOW, WILMER HALE HAD TOLD THE GOVERNMENT A MONTH IN  
10:35AM 18 ADVANCE WHAT SOFTWARE IT WAS GOING TO NEED TO PROCESS THE  
10:35AM 19 DATABASE, AND THERE'S NO EVIDENCE THAT IT ACTED ON THAT  
10:35AM 20 INFORMATION.

10:35AM 21 THE COURT: DID WILMER HALE EVER PROVIDE INFORMATION  
10:35AM 22 TO THE GOVERNMENT THAT THEY WOULD NEED THE KEY, THE MISSING  
10:35AM 23 KEY? WAS THAT EVER GIVEN TO THE GOVERNMENT?

10:35AM 24 MS. SAHARIA: I HAVE NOT SEEN THAT EVIDENCE IN THE  
10:35AM 25 RECORD, NOR HAVE I SEEN EVIDENCE THAT THE GOVERNMENT ATTEMPTED

10:35AM 1 TO OPEN THE DATABASE AND REALIZED IT NEEDED A PASSWORD. FOR A  
10:36AM 2 YEAR AND A HALF THE FIRST RECORDED ATTEMPT FROM THE GOVERNMENT  
10:36AM 3 TO ASK FOR A PASSWORD FOR THE DATABASE OCCURRED IN MARCH OR  
10:36AM 4 APRIL OF 2020. THIS IS EXHIBIT 88, AGAIN, THEIR BRADY LETTER,  
10:36AM 5 AT PARAGRAPH 52.

10:36AM 6 THE GOVERNMENT DOESN'T INDICATE EXACTLY WHEN THAT  
10:36AM 7 OCCURRED. THEY INDICATE THAT THEY REACHED OUT TO WILMER HALE  
10:36AM 8 IN MARCH OR APRIL OF 2020. I WOULD SUBMIT IT'S NOT A  
10:36AM 9 COINCIDENCE THAT THAT IS THE VERY MOMENT WHEN WE STARTED ASKING  
10:36AM 10 THE GOVERNMENT TO SUPPORT ITS ALLEGATIONS IN ITS 404(B) LETTER  
10:36AM 11 THAT IT COULD NOT ACCESS THE LIS DATABASE.

10:36AM 12 BUT FOR A YEAR AND A HALF THE GOVERNMENT DID NOTHING WITH  
10:36AM 13 THIS COPY OF THE LIS DATABASE SITTING ON A PARALEGAL'S SHELF,  
10:36AM 14 AND IF IT HAD ACTED PROMPTLY AS YOU WOULD EXPECT A PROSECUTOR  
10:36AM 15 WITH THE MOST CENTRAL EVIDENCE IN THE CASE TO DO, THEY VERY  
10:36AM 16 WELL WOULD HAVE FOUND THE PASSWORD. THEY VERY WELL WOULD --

10:37AM 17 THE COURT: THEY WOULD HAVE FOUND THE PASSWORD, THE  
10:37AM 18 KEY TO OPEN THIS?

10:37AM 19 MS. SAHARIA: WELL, THEY, THEY, THEY PRESUMABLY --

10:37AM 20 THE COURT: THEY NEVER HAD --

10:37AM 21 MS. SAHARIA: RIGHT, THEY NEVER HAD THAT.

10:37AM 22 BUT THERE WAS EVIDENCE THAT THERE WERE PEOPLE CONNECTED  
10:37AM 23 WITH THERANOS WHO MIGHT HAVE HAD THAT KEY IF THE GOVERNMENT HAD  
10:37AM 24 PROMPTLY REALIZED THAT IT NEEDED IT.

10:37AM 25 AGAIN, THE SUPPORT STAFF SUGGESTED MULTIPLE THINGS THAT

10:37AM 1 THE GOVERNMENT MIGHT HAVE DONE, WHICH WOULD HAVE, NUMBER ONE,

10:37AM 2 LED IT TO REALIZE THAT IT NEEDED A SECOND PASSWORD TO OPEN THE

10:37AM 3 LIS DATABASE.

10:37AM 4 BUT SECOND OF ALL, WE DON'T KNOW IF THERE ARE OTHER WAYS

10:37AM 5 THAT THE GOVERNMENT COULD HAVE ACCESSED THIS DATABASE, AND

10:37AM 6 THEIR SUPPORT STAFF SUGGESTED THOSE AVENUES TO THEM.

10:37AM 7 FIRST, THEY SUGGESTED THAT THEY CONNECT WITH THE FBI. THE

10:37AM 8 GOVERNMENT HAS ACCESS TO THE MOST SOPHISTICATED COMPUTER

10:37AM 9 EXPERTS IN THE WORLD AT THE FBI. WE ALL KNOW FROM PUBLIC

10:38AM 10 RECORDING OF THE SOPHISTICATED TOOLS THAT THE FBI USES EVERY

10:38AM 11 DAY TO ACCESS FORENSIC DATA FROM COMPUTERS. THERE'S NO

10:38AM 12 EVIDENCE THAT THE GOVERNMENT ACTED ON THAT SUGGESTION. THERE'S

10:38AM 13 NO EVIDENCE TO THIS DAY THAT THE GOVERNMENT HAS EVER ASKED ITS

10:38AM 14 COUNTERPARTS IN THE FBI IF THEY COULD OPEN THE DATABASE.

10:38AM 15 AGAIN, THE SUPPORT STAFF SUGGESTED THAT THEY GET THE

10:38AM 16 PHYSICAL SERVERS. THERE'S NO EVIDENCE THAT THEY DID THAT.

10:38AM 17 THERE'S NO EVIDENCE THAT THE GOVERNMENT DID MUCH OF

10:38AM 18 ANYTHING FOR A YEAR AND A HALF, WHICH IS THE FIRST TIME THAT IT

10:38AM 19 REALIZED IT NEEDED A PASSWORD. AND AT THAT POINT IT WAS TOO

10:38AM 20 LATE TO TRACK DOWN THE PEOPLE WHO MIGHT HAVE THAT PASSWORD.

10:38AM 21 THE COURT: RIGHT, BECAUSE THEY RECEIVED IT ON

10:38AM 22 AUGUST 27TH, AND FOUR DAYS LATER IT WAS DECOMMISSIONED NOT BY

10:38AM 23 THE GOVERNMENT BUT BY SOMEONE ELSE, SOMEONE, A THIRD PARTY. I

10:38AM 24 DON'T KNOW WHO DID THAT, BUT PERHAPS IT'S IN THE PROCESS OF

10:38AM 25 DECOMMISSIONING.

10:38AM 1 SO FOR THOSE FOUR DAYS THE GOVERNMENT SHOULD HAVE,  
10:38AM 2 ACCORDING TO YOUR POSITION, SHOULD HAVE ACCESSED IT TO  
10:39AM 3 DETERMINE WHETHER OR NOT THEY COULD ACTUALLY OPEN IT UP IN  
10:39AM 4 THOSE FOUR DAYS BECAUSE THAT WAS THE LIFESPAN OF THE DATABASE,  
10:39AM 5 AT LEAST AS IT EXISTED BEFORE IT WAS DECOMMISSIONED.  
10:39AM 6 SO THEY SHOULD HAVE DONE SOMETHING IN THOSE FOUR DAYS, BUT  
10:39AM 7 THEY DIDN'T. SO IT SEEMS LIKE WHATEVER THEY DID AFTERWARDS,  
10:39AM 8 ISN'T THAT KIND OF IMMATERIAL BECAUSE THEY COULDN'T HAVE DONE  
10:39AM 9 THAT?  
10:39AM 10 732-4 I THINK IS A JUNE 25TH EMAIL FROM DAVID TAYLOR TO  
10:39AM 11 SOMEBODY, AND IT'S REGARDING A MEETING ON THE LIS. I THINK YOU  
10:39AM 12 SEE THAT. AND DIDN'T HE SAY "WE SHOULD JUST GIVE THE DOJ THE  
10:39AM 13 DATABASE AND LET THEM FIGURE IT OUT. THEY WON'T KNOW WHAT TO  
10:39AM 14 DO WITH IT AND THAT THE PEOPLE WHO DO ARE IN INDIA. OUR  
10:39AM 15 EXPERTS ARE THE ONLY ONES WHO UNDERSTAND IT, AND WE DON'T WANT  
10:39AM 16 TO MAKE THEM PERCIPIENT WITNESSES. IS THERE ANYONE LEFT IN THE  
10:39AM 17 COMPANY WHO CAN ASSIST US IN ACTUALLY GETTING THE DATABASE TO  
10:39AM 18 THE GOVERNMENT?" AND THIS WAS AT A PRE-INDICTMENT TIME.  
10:40AM 19 AND THERANOS HAD, OF COURSE, CONTROL OF THE LIS. THEY HAD  
10:40AM 20 ACCESS TO IT. SO DOESN'T THAT SUGGEST THAT AT LEAST THERE WAS  
10:40AM 21 SOME KNOWLEDGE, I WON'T CALL IT SCIENTER, BUT THERE WAS SOME  
10:40AM 22 KNOWLEDGE THAT THIS KEY HAD TO BE CREATED BACK THEN?  
10:40AM 23 AND I'M GETTING A LITTLE AHEAD OF OURSELVES, BUT IT SEEMS  
10:40AM 24 LIKE YOUR CLIENT, AT LEAST THE DEFENSE, WOULD HAVE ALSO KNOWN  
10:40AM 25 OF THE IMPORTANCE OF THIS SUCH THAT -- AND THIS IS KIND OF A

10:40AM 1 BALANCING, I SUPPOSE, PART OF OUR BALANCING CONVERSATION --  
10:40AM 2 SUCH THAT BECAUSE YOUR CLIENT HAD, LET'S CALL IT, PRIVITY TO  
10:40AM 3 THE DATABASE AND KNOWLEDGE OF ITS IMPORTANCE, SHE, TOO, COULD  
10:40AM 4 HAVE SECURED A COPY. IS THAT SOMETHING THAT SHOULD ENTER INTO  
10:40AM 5 THE CONVERSATION OR THE EQUATION?

10:40AM 6 I'VE ASKED YOU A LOT THERE, MS. SAHARIA. I APOLOGIZE.

10:40AM 7 MS. SAHARIA: YEAH. SO I THINK THAT THERE ARE THREE  
10:40AM 8 COMPONENTS TO THAT. LET ME START WITH THE FIRST ONE.

10:40AM 9 OUR ARGUMENT DOES NOT REST ON FOUR DAYS. THE FACT THAT  
10:41AM 10 THE COPY WAS PRODUCED AND FOUR DAYS LATER THE PHYSICAL SERVER  
10:41AM 11 WAS TAKEN APART AND MOVED IS NOT MATERIAL TO OUR ARGUMENT  
10:41AM 12 BECAUSE THERE ARE STEPS THAT THE GOVERNMENT REASONABLY SHOULD  
10:41AM 13 HAVE TAKEN EVEN AFTER THOSE FOUR DAYS.

10:41AM 14 FIRST, REACHED OUT TO THERANOS -- FIGURED OUT THAT THEY  
10:41AM 15 COULDN'T OPEN THE DATABASE AND WHY. AND THE REASON PRESUMABLY,  
10:41AM 16 ACCORDING TO THE GOVERNMENT, IS BECAUSE THEY LACKED THE  
10:41AM 17 PASSWORD. IT TOOK THEM A YEAR AND A HALF TO REALIZE THAT. BUT  
10:41AM 18 IF THEY REALIZED THAT PROMPTLY, NOT WITHIN FOUR DAYS BUT WITHIN  
10:41AM 19 A REASONABLE AMOUNT OF TIME, THEY COULD HAVE TALKED TO  
10:41AM 20 THERANOS'S COUNSEL, ALERTED THEM TO THIS ISSUE, AND THEY COULD  
10:41AM 21 HAVE, ONE WOULD THINK, FOUND SOMEONE WHO HAD THE APPROPRIATE  
10:42AM 22 PASSWORD.

10:42AM 23 THERE IS EVIDENCE IN THE RECORD OF VARIOUS PEOPLE WHO  
10:42AM 24 MIGHT HAVE HAD THAT PASSWORD, NONE OF WHOM THE GOVERNMENT  
10:42AM 25 APPROACHED AT THE RELEVANT TIME OR THEY DIDN'T APPROACH THE

10:42AM 1 COUNSEL EITHER TO TRY TO GET THE PASSWORD.

10:42AM 2 LIKEWISE, AS I'VE ALREADY INDICATED, THE PHYSICAL SERVER

10:42AM 3 WAS, WE BELIEVE THIS WOULD COME OUT AT A HEARING, STILL

10:42AM 4 AVAILABLE IN THE POSSESSION OF THE ASSIGNEE. THEY COULD HAVE

10:42AM 5 TAKEN THE PHYSICAL SERVER AT THAT TIME AND USED THE PHYSICAL

10:42AM 6 SERVER TO ACCESS THE LIS DATABASE.

10:42AM 7 SO THAT'S, THAT'S -- I THINK THE FIRST QUESTION IS WE'RE

10:42AM 8 NOT SAYING THEY HAD TO DO ALL OF THESE THINGS IN FOUR DAYS, BUT

10:42AM 9 PROSECUTORS HAVE AN OBLIGATION TO ACT DILIGENTLY AND PROMPTLY

10:42AM 10 WHEN THEY'RE DEALING WITH THE MOST CRITICAL EVIDENCE IN THE

10:42AM 11 CASE AND EVIDENCE THAT HAS EXTREME EXONERATORY VALUE TO A

10:42AM 12 DEFENDANT TO MAKE SURE THAT THAT EVIDENCE IS PRESERVED AND

10:42AM 13 AVAILABLE TO THE DEFENDANT, AND THEY DIDN'T DO THAT HERE. SO

10:43AM 14 THAT'S THE FIRST QUESTION.

10:43AM 15 THE COURT: YOUR CLIENT HAD, YOUR CLIENT HAD ACTUAL

10:43AM 16 POSSESSION OF THE DATABASE BEFORE IT WAS DECOMMISSIONED.

10:43AM 17 MS. SAHARIA: WELL, THERANOS DID.

10:43AM 18 THE COURT: YES.

10:43AM 19 MS. SAHARIA: AT THE TIME OF THE DECOMMISSIONING,

10:43AM 20 MS. HOLMES WAS NOT CEO OF THE COMPANY. SHE HAD ALREADY BEEN

10:43AM 21 INDICTED.

10:43AM 22 THE GOVERNMENT HAS PRODUCED NO EVIDENCE DESPITE ITS

10:43AM 23 CONTINUED INSINUATIONS THAT MS. HOLMES HAD ANY KNOWLEDGE OF ANY

10:43AM 24 OF THESE FACTS.

10:43AM 25 THE COURT: SURE. THAT WAS --

10:43AM 1 MS. SAHARIA: NOW, WITH RESPECT TO WHETHER SHE COULD  
10:43AM 2 HAVE SECURED THE DATABASE, I'M NOT SURE WHAT I CAN DISCLOSE  
10:43AM 3 ABOUT THAT ISSUE WITHOUT DISCLOSING PRIVILEGED COMMUNICATIONS,  
10:43AM 4 SO I DON'T FEEL COMFORTABLE ANSWERING YOUR HONOR'S QUESTION AT  
10:43AM 5 THIS TIME OTHER THAN TO SAY THAT MS. HOLMES HAS ALWAYS BELIEVED  
10:43AM 6 THAT THE DATABASE WOULD BE EXONERATORY IN THIS CASE.  
10:43AM 7 THE SECOND QUESTION THAT YOUR HONOR ASKED RELATES TO --  
10:44AM 8 THE COURT: THEN WHY DIDN'T YOU HAVE A COPY OF IT,  
10:44AM 9 THEN? I GUESS I'M NOT MISSING -- I'M MISSING THAT PART. IS  
10:44AM 10 THAT PART OF THE BALANCING THAT IT WAS NOT IN THE GOVERNMENT'S  
10:44AM 11 POSSESSION, THE ACTUAL WORKING COPY? THE GOVERNMENT NEVER HAD  
10:44AM 12 AN ACTUAL WORKING COPY OF THE DATABASE. THERANOS DID.  
10:44AM 13 AND AS YOU JUST SAID, IT WAS ALWAYS IMPORTANT TO YOUR  
10:44AM 14 CLIENT FOR THE EXONERATORY REASONS. SHE HAD COUNSEL AT THE  
10:44AM 15 TIME THAT THIS WAS GOING ON.  
10:44AM 16 DOES THAT FACT ENTER INTO THE BALANCING AT ALL?  
10:44AM 17 MS. SAHARIA: I'M RELUCTANT TO ANSWER THAT QUESTION  
10:44AM 18 WITHOUT CONSULTING WITH THE REST OF MY TEAM AND MY CLIENT --  
10:44AM 19 THE COURT: OKAY. SURE. OF COURSE.  
10:44AM 20 MS. SAHARIA: -- BECAUSE I DON'T WANT TO REVEAL  
10:44AM 21 PRIVILEGED COMMUNICATIONS OR COMMON INTEREST PRIVILEGED  
10:44AM 22 COMMUNICATIONS, YOUR HONOR.  
10:44AM 23 THE COURT: OKAY. FAIR ENOUGH. FAIR ENOUGH.  
10:44AM 24 MS. SAHARIA: BUT I WILL CONSULT WITH MY TEAM ABOUT  
10:44AM 25 THAT QUESTION.

10:45AM 1 YOU HAD ALSO ASKED A QUESTION ABOUT A PARTICULAR EMAIL  
10:45AM 2 FROM MR. TAYLOR WHO DID BECOME THE CEO OF THE COMPANY. I DON'T  
10:45AM 3 THINK ANYTHING IN THAT EMAIL REVEALS ANY SORT OF NEFARIOUS  
10:45AM 4 INTENT TO HIDE A PASSWORD FROM THERANOS, EXCUSE ME, FROM THE  
10:45AM 5 GOVERNMENT. THERE'S NOTHING I THINK IN THAT EMAIL ABOUT THAT  
10:45AM 6 FACT, BUT I DO THINK THAT'S WHY ALL OF THESE ISSUES CREATE  
10:45AM 7 DISPUTED ISSUES OF FACT THAT SHOULD BE EXPLORED AT A HEARING.  
10:45AM 8 WHAT DID THE GOVERNMENT KNOW ABOUT THE IMPLICATIONS OF  
10:45AM 9 THERANOS CLOSING?  
10:45AM 10 WHY DID IT WAIT A YEAR AND A HALF TO SECURE THE MOST  
10:45AM 11 IMPORTANT EVIDENCE IN THE CASE AT A TIME WHEN IT KNEW THE  
10:45AM 12 COMPANY WAS ABOUT TO CLOSE AND THAT IT MAY LACK ACCESS TO THAT  
10:45AM 13 INFORMATION?  
10:45AM 14 WHY DID IT SIT WITH THE HARD COPY OF THE LIS DATABASE FOR  
10:45AM 15 A YEAR AND A HALF?  
10:46AM 16 WHY DID IT SHOW SUCH LITTLE INTEREST IN THIS EVIDENCE THAT  
10:46AM 17 IT CLAIMS WOULD HAVE BEEN INculpatory, THE MOST RELEVANT  
10:46AM 18 EVIDENCE IN THE CASE, AND IT SHOWED NO INTEREST IN ACCESSING IT  
10:46AM 19 FOR A YEAR AND A HALF, AND BY THE TIME IT FINALLY TRIED TO  
10:46AM 20 ACCESS IT, ALL OF THE WITNESSES WHO COULD HAVE PROVIDED A  
10:46AM 21 PASSWORD PRESUMABLY DON'T HAVE ACCESS TO IT ANYMORE, AND THE  
10:46AM 22 PHYSICAL SERVER THAT COULD HAVE BEEN RESTORED, ACCORDING TO THE  
10:46AM 23 EXPERTS WHO WORKED AT THERANOS, ALSO HAD BEEN LOST?  
10:46AM 24 SO IT IS FUNDAMENTALLY THE GOVERNMENT'S LACK OF DILIGENCE,  
10:46AM 25 ITS FAILURE TO HEED THE ADVICE OF ITS STAFF THAT HAS PUT -- AND

10:46AM 1 ITS EXTREME DELAY IN TRYING TO GET THIS EVIDENCE IN THE FIRST  
10:46AM 2 PLACE THAT IS AT LEAST PARTLY TO BLAME FOR OUR INABILITY TO USE  
10:46AM 3 THE DATABASE.

10:46AM 4 I'VE JUMPED AHEAD TO KIND OF COVERING A LOT OF THE FACTS.  
10:46AM 5 LET ME JUST, IF I MAY, TOUCH ON A FEW LEGAL ISSUES THAT I THINK  
10:47AM 6 COME OUT OF THE PARTIES' BRIEFS, AND THEN I'LL GO BACK AND  
10:47AM 7 COVER A FEW OF THE OTHER RELEVANT FACTS HERE.

10:47AM 8 AS I INDICATED AT THE BEGINNING, WE HAVE MOVED UNDER TWO  
10:47AM 9 STANDARDS. THE FIRST IS THE DUE PROCESS CLAUSE AND THE SECOND  
10:47AM 10 IS LOUD HAWK.

10:47AM 11 THE LOUD HAWK STANDARD GOVERNS SANCTIONS THAT ARE LESS  
10:47AM 12 THAN DISMISSAL SUCH AS SUPPRESSION, AND THE LOUD HAWK TEST IS  
10:47AM 13 GOVERNED BY THEN JUDGE KENNEDY'S, JUSTICE KENNEDY'S CONCURRING  
10:47AM 14 OPINION IN THAT CASE THAT HAS BEEN ADOPTED BY THE NINTH CIRCUIT  
10:47AM 15 AS THE LAW OF THE CIRCUIT.

10:47AM 16 JUDGE KENNEDY ARTICULATED A BALANCING TEST THAT I THINK  
10:47AM 17 YOUR HONOR HAS ALLUDED TO. YOU HAVE ON ONE SIDE THE QUALITY OF  
10:47AM 18 THE GOVERNMENT CONDUCT THAT IS WEIGHED AGAINST THE PREJUDICE TO  
10:47AM 19 THE DEFENDANT. AND AS JUDGE KENNEDY EXPLAINED, IT'S DONE ON A  
10:47AM 20 SLIDING SCALE OF SORTS. SO THE GREATER THE PREJUDICE TO THE  
10:47AM 21 DEFENDANT, THE LESS CULPABLE CONDUCT YOU REQUIRE FROM THE  
10:48AM 22 GOVERNMENT AND VICE VERSA, THE MORE CULPABLE THE GOVERNMENT  
10:48AM 23 CONDUCT, THE LESS THE AMOUNT OF PREJUDICE THAT WOULD BE  
10:48AM 24 REQUIRED. AND IN CASES OF SEVERE PREJUDICE, FOR EXAMPLE, HE  
10:48AM 25 SAID THE GOOD FAITH OR BAD FAITH OF THE GOVERNMENT MIGHT BE

10:48AM 1 IMMATERIAL TO CONDUCTING THAT BALANCING TEST.

10:48AM 2 AS I INDICATED BEFORE, IT'S THE GOVERNMENT'S BURDEN UNDER

10:48AM 3 THAT TEST TO JUSTIFY ITS CONDUCT, AND THEN THE DEFENDANT BEARS

10:48AM 4 THE BURDEN TO ESTABLISH PREJUDICE.

10:48AM 5 LET ME JUST TOUCH ON TWO ISSUES THAT RELATE TO THAT

10:48AM 6 BALANCING TEST THAT COME OUT OF THE GOVERNMENT'S OPPOSITION

10:48AM 7 BRIEF.

10:48AM 8 FIRST, THE GOVERNMENT REPEATEDLY CLAIMS IN ITS BRIEF THAT

10:48AM 9 BAD FAITH IS REQUIRED. UNDER LOUD HAWK THAT IS SIMPLY

10:48AM 10 INCORRECT. THAT'S AN INCORRECT STATEMENT OF THE LAW.

10:48AM 11 THE GOVERNMENT CITED JUDGE TRASK'S OPINION IN LOUD HAWK

10:48AM 12 FOR THAT PROPOSITION WHERE THEY STATED THAT BAD FAITH OR

10:48AM 13 CONNIVANCE IS REQUIRED. BUT JUDGE TRASK'S OPINION IS NOT THE

10:49AM 14 LAW OF THE CIRCUIT, JUDGE KENNEDY'S OPINION IS. AND AS I'VE

10:49AM 15 INDICATED, JUDGE KENNEDY'S OPINION IS CRYSTAL CLEAR THAT BAD

10:49AM 16 FAITH IS NOT REQUIRED.

10:49AM 17 THE SECOND IS THAT THE SAME INQUIRY UNDER LOUD HAWK

10:49AM 18 APPLIES TO A CASE WHERE THE GOVERNMENT EITHER FAILED TO

10:49AM 19 PRESERVE EVIDENCE IN ITS POSSESSION OR FAILED TO COLLECT

10:49AM 20 EVIDENCE.

10:49AM 21 WE THINK THIS IS NOT A CASE ABOUT A FAILURE TO COLLECT FOR

10:49AM 22 THE REASONS WE'VE BEEN DISCUSSING. THE GOVERNMENT DID HAVE A

10:49AM 23 COPY OF THE LIS DATABASE IN ITS POSSESSION AND DIDN'T TAKE ANY

10:49AM 24 STEPS TO TRY TO MAKE IT WORK, BUT EVEN IF THE COURT THOUGHT

10:49AM 25 THAT THIS WAS A CASE ABOUT A FAILURE TO COLLECT, WHEN

10:49AM 1 JUDGE KENNEDY ENUMERATED THE FACTORS THAT ARE RELEVANT TO THE  
10:49AM 2 GOVERNMENT CONDUCT, ONE OF THE FACTORS IS, QUOTE, "WHETHER THE  
10:49AM 3 EVIDENCE WAS LOST OR DESTROYED WHILE IN ITS CUSTODY."  
10:49AM 4 SO THAT IS A RELEVANT FACTOR, WHETHER THE GOVERNMENT HAD  
10:49AM 5 CUSTODY OF THE EVIDENCE WHEN IT WAS LOST, BUT IT'S NOT  
10:50AM 6 DISPOSITIVE. JUDGE KENNEDY CLEARLY ARTICULATED THAT AS ONE OF  
10:50AM 7 SEVERAL RELEVANT FACTORS. AND SO WE SUBMIT THAT THE  
10:50AM 8 GOVERNMENT'S SUBMISSION TO THE COURT THAT THAT IS DISPOSITIVE  
10:50AM 9 IS NOT SUPPORTED BY LOUD HAWK AND NO NINTH CIRCUIT CASE SO  
10:50AM 10 HOLDS.  
10:50AM 11 I'M NOT GOING TO DISCUSS THE DUE PROCESS INQUIRY UNTIL THE  
10:50AM 12 COURT HAS QUESTIONS ABOUT THAT, BUT I WILL JUST NOTE THAT IT'S  
10:50AM 13 ALSO CRYSTAL CLEAR UNDER NINTH CIRCUIT LAW THAT A FAILURE TO  
10:50AM 14 COLLECT EVIDENCE CAN GIVE RISE TO A DUE PROCESS VIOLATION IF IT  
10:50AM 15 OCCURS IN BAD FAITH, AND THAT'S THE MILLER VERSUS VASQUEZ CASE.  
10:50AM 16 SO, YOUR HONOR, WE'VE ALREADY DISCUSSED SOME OF THE  
10:50AM 17 RELEVANT FACTS THAT WE THINK GIVE RISE TO A DISPUTE OF FACT  
10:50AM 18 WITH RESPECT TO THE GOVERNMENT'S CONDUCT. THE GOVERNMENT  
10:50AM 19 ITSELF HAS CONCEDED THAT DISPUTE IN THE PAST. AT THE MAY 4TH  
10:50AM 20 HEARING IT SAID, "WHEN IT COMES TO BLAME FOR THE LOSS OF THE  
10:51AM 21 LIS, AS THE COURT CAN TELL THIS IS A VERY HOTLY DEBATED FACTUAL  
10:51AM 22 DISPUTE." THAT WAS AT PAGE 81 AND THEN AGAIN AT PAGE 83. SO  
10:51AM 23 THERE IS A FACTUAL DISPUTE HERE. THE GOVERNMENT RECOGNIZES  
10:51AM 24 THAT.  
10:51AM 25 WE FULLY AGREE THERE IS A DISPUTE OF FACT. EVEN IF THE

10:51AM 1 COURT THINKS THAT THERE IS SOME BLAME ON THE THERANOS SIDE,  
10:51AM 2 AND, AGAIN, NONE OF THAT BLAME LIES WITH MS. HOLMES, THERE'S A  
10:51AM 3 WHOLE HOST OF FACTS THAT ARE NOT YET CLEAR BOTH WITH RESPECT TO  
10:51AM 4 WHAT HAPPENED ON THE THERANOS SIDE OF THINGS AND WITH RESPECT  
10:51AM 5 TO WHAT HAPPENED ON THE GOVERNMENT'S SIDE OF THINGS AND IN  
10:51AM 6 PARTICULAR THE REASONS WHY THE PROSECUTORS BOTH DELAYED SO LONG  
10:51AM 7 IN ATTEMPTING TO COLLECT THE EVIDENCE AND THEN WHY THEY DELAYED  
10:51AM 8 SO LONG IN ATTEMPTING TO ACCESS THE EVIDENCE SUCH THAT THE  
10:51AM 9 ABILITY TO ACCESS IT OR TO OBTAIN THE PHYSICAL SERVER WAS AT  
10:51AM 10 THAT POINT GONE.

10:52AM 11 THE GOVERNMENT CLEARLY KNEW THE VALUE OF LIS. IT HAD  
10:52AM 12 KNOWN FOR A YEAR AND A HALF, SINCE DECEMBER OF 2016 AT LEAST,  
10:52AM 13 ABOUT THE LIS DATABASE. IT KNEW THAT IT CONTAINED ALL OF THE  
10:52AM 14 TEST RESULTS. IT KNEW THAT IT IDENTIFIED THE SPECIFIC DEVICE  
10:52AM 15 THAT GENERATED EACH RESULT WHICH IS VERY IMPORTANT EVIDENCE IN  
10:52AM 16 THIS CASE THAT HAS BEEN LOST. IT KNEW THAT THE ACCURACY AND  
10:52AM 17 RELIABILITY OF THE TEST RESULTS WOULD BE CENTRAL TO ITS CASE  
10:52AM 18 GIVEN THE ALLEGATIONS IN THE INDICTMENT, AND IT KNEW THAT SOME  
10:52AM 19 DOCTORS WHO HAD SENT PATIENTS TO LIS BELIEVED THAT THEIR TEST  
10:52AM 20 RESULTS WERE ACCURATE AND RELIABLE. THOSE TEST RESULTS  
10:52AM 21 OF COURSE RESIDED IN THE LIS AND CONSTITUTE EXONERATORY  
10:52AM 22 EVIDENCE THAT WAS IN THE LIS.

10:52AM 23 I'M NOT GOING TO REPEAT THE FACTS THAT WE HAVE TALKED  
10:52AM 24 ABOUT WITH RESPECT TO THE GOVERNMENT'S BOTH DISREGARDING OF THE  
10:53AM 25 ADVICE FROM THERANOS'S COUNSEL ABOUT WHAT THEY NEEDED TO DO TO

10:53AM 1 RESTORE THE DATABASE, TO OBTAIN THE SPECIFIC SOFTWARE, NOR --  
10:53AM 2 AND THEN AS WELL AS THE ADVICE FROM THE SUPPORT STAFF. JUST  
10:53AM 3 FOR THE RECORD, THAT'S OUTLINED IN THE GOVERNMENT'S BRADY  
10:53AM 4 LETTER AT PARAGRAPHS 46 TO 47 AND 49. AS I INDICATED, THERE IS  
10:53AM 5 REASON TO THINK THAT THOSE WOULD HAVE BEEN FRUITFUL AVENUES  
10:53AM 6 EITHER CONSULTING WITH THE FBI OR OBTAINING THE ACTUAL PHYSICAL  
10:53AM 7 HARDWARE WHICH MULTIPLE WITNESSES HAVE SAID COULD HAVE BEEN  
10:53AM 8 RESTORED.  
10:53AM 9 TO BE SURE THE GOVERNMENT -- YOU KNOW, I'M SURE WE'RE  
10:53AM 10 GOING TO HEAR THIS -- WANTS TO PIN THE BLAME ON THE THERANOS  
10:53AM 11 INDIVIDUALS WHO PRODUCED THE DATABASE COPY, AGAIN, THAT WAS  
10:53AM 12 ONLY ONE OF TWO PATHS. THAT DOESN'T ADDRESS THE SERVER ITSELF  
10:54AM 13 AND THE GOVERNMENT'S FAILURE TO COLLECT THAT PHYSICAL SERVER.  
10:54AM 14 BUT AGAIN, EVEN WITH RESPECT TO THAT, WHAT HAPPENED WITH THE  
10:54AM 15 DATABASE COPY, THE RECORD IS JUST NOT VERY PRECISE ABOUT WHY  
10:54AM 16 THAT HAPPENED, WHAT THOSE INDIVIDUALS THOUGHT ABOUT WHETHER THE  
10:54AM 17 GOVERNMENT COULD ACCESS THAT COPY.  
10:54AM 18 AND WITH THE BURDEN ON THE GOVERNMENT TO JUSTIFY ITS  
10:54AM 19 CONDUCT AND THEIR FAILURE TO JUSTIFY THEIR EXTREME DELAYS IN  
10:54AM 20 BOTH OBTAINING AND ACCESSING THE COPY, WE JUST THINK THEY  
10:54AM 21 HAVEN'T MADE THAT SHOWING AT THIS POINT AND THAT IS WHY A  
10:54AM 22 HEARING IS REQUIRED.  
10:54AM 23 THE COURT: THANK YOU.  
10:54AM 24 LET ME ASK, MS. SAHARIA, WE'RE TALKING ABOUT ANECDOTAL,  
10:54AM 25 AND THIS IS PART OF THE IN LIMINE MOTIONS, WHETHER OR NOT

10:54AM 1 ANECDOTAL INFORMATION CAN COME IN. YOUR IN LIMINE MOTION,

10:54AM 2 MAYBE IT WAS THE GOVERNMENT'S, SOUGHT TO PRECLUDE YOU, HOUR

10:54AM 3 TEAM, FROM USING THE TERM "ANECDOTAL. I THINK THERE WAS

10:54AM 4 SOMETHING PEJORATIVE ABOUT THAT TERM IN THE GOVERNMENT'S MIND.

10:55AM 5 AND I THINK I SAID, NO, YOU CAN PUT ON A DEFENSE. YOU

10:55AM 6 CAN CALL IT WHAT YOU WOULD LIKE, ET CETERA.

10:55AM 7 IN THAT REGARD IT SEEMS LIKE THERE'S CRITICISM OF AT LEAST

10:55AM 8 THE STATE OF THE EVIDENCE NOW, PRETRIAL I UNDERSTAND, THAT

10:55AM 9 THERE WAS ARGUMENT IN LIMINE THAT, WELL, THEY'RE ONLY GOING TO

10:55AM 10 HAVE 11 WITNESSES WHO ARE TALKING TO TALK ABOUT BAD TESTS, I'LL

10:55AM 11 JUST CALL IT BAD TESTS, INCORRECT TESTS, AND THAT'S NOT ENOUGH.

10:55AM 12 AND THAT WAS, I THINK, THE DEFENSE ARGUMENT AS TO AN ISSUE.

10:55AM 13 BUT IN THE DOCUMENTS THAT I'VE READ IN REGARDS TO THIS

10:55AM 14 MOTION, I THINK YOU TALK ALSO ABOUT -- YOUR TEAM, NOT YOU BUT

10:55AM 15 YOUR TEAM, TALK ABOUT YOU HAVE OTHER DOCTORS WHO, INCLUDING A

10:55AM 16 DOCTOR WHO IS GOING TO SAY, OH, THEY WERE MY GO TO. THERANOS

10:55AM 17 WAS MY GO-TO TESTER, AND I HAD GREAT CONFIDENCE IN THEM.

10:55AM 18 I RAISE THAT BECAUSE THAT SEEMS THAT YOU HAVE EVIDENCE

10:55AM 19 THAT YOU CAN PUT ON TO REBUT, TO CHALLENGE THE ANECDOTAL, I'LL

10:56AM 20 CALL IT, EVIDENCE THAT THE GOVERNMENT IS GOING TO PUT ON

10:56AM 21 VIS-A-VIS THESE DOCTORS THAT YOU HAVE IDENTIFIED AND OTHER

10:56AM 22 WITNESSES THAT YOU HAVE IDENTIFIED IN THESE PLEADINGS.

10:56AM 23 IS THAT ACCURATE?

10:56AM 24 MS. SAHARIA: SO I THINK THAT QUESTION BRINGS US TO

10:56AM 25 THE SECOND PART OF THE BALANCING TEST, WHICH IS WHAT IS THE

10:56AM 1 PREJUDICE TO THE DEFENSE?

10:56AM 2 AND ONE OF THE FACTORS THAT JUDGE KENNEDY OUTLINED IN

10:56AM 3 LOUD HAWK IS THE ADEQUACY OF THE SUBSTITUTE EVIDENCE, IN THIS

10:56AM 4 CASE SUBSTITUTE EVIDENCE, ANECDOTES FROM INDIVIDUAL DOCTORS,

10:56AM 5 FOR INSTANCE, THAT THEY RECEIVED IN ACCURATE TEST RESULTS.

10:56AM 6 AND WE WOULD SUBMIT THAT THERE'S NO SUBSTITUTE FOR THE

10:56AM 7 LIS DATABASE. THE GOVERNMENT ADMITTED THIS ITSELF IN ITS

10:56AM 8 OPPOSITION BRIEF TO OUR MOTION TO EXCLUDE ANECDOTAL EVIDENCE.

10:56AM 9 THIS WAS ECF 682, PAGE 1. THEY SAID, "DATA IS A POWERFUL THING

10:57AM 10 BECAUSE IT SPEAKS FOR ITSELF."

10:57AM 11 WE TOTALLY AGREE WITH THAT. THERE'S NOTHING LIKE HAVING

10:57AM 12 THE ACTUAL DATA AND THE ACTUAL TEST RESULTS AND ALL OF THE

10:57AM 13 INFORMATION ABOUT THOSE TEST RESULTS TO CONVINCE A JURY THAT

10:57AM 14 THE GOVERNMENT'S CASE IS WRONG.

10:57AM 15 AN ANECDOTE FROM A DOCTOR THAT THEY HAD A GOOD EXPERIENCE

10:57AM 16 IS NO SUBSTITUTE FOR HARD COLD SCIENTIFIC DATA THAT RESIDED IN

10:57AM 17 THE DATABASE.

10:57AM 18 I CAN GIVE THE COURT I THINK MAYBE FIVE EXAMPLES OF THE

10:57AM 19 EXTREME PREJUDICE THAT HAS ACCRUED TO MS. HOLMES FROM THE

10:57AM 20 INABILITY TO ACCESS THE LIS DATA THAT I THINK GO TO THIS

10:57AM 21 QUESTION.

10:57AM 22 THE FIRST IS VAST QUANTITIES OF ACCURATE AND RELIABLE TEST

10:57AM 23 RESULTS RESIDE IN THE LIS DATABASE, RESIDED IN THE DATABASE I

10:57AM 24 SHOULD SAY, ALMOST CERTAINLY MILLIONS OF THEM.

10:57AM 25 AND WE CAN, YOU KNOW, CALL A DOCTOR TO TALK ABOUT THEIR

10:58AM 1 ANECDOTAL EXPERIENCE TO TRY TO COUNTER THE GOVERNMENT'S  
10:58AM 2 ANECDOTES, BUT THAT'S NO MATCH FOR THE MILLIONS OF WHAT WE  
10:58AM 3 BELIEVE ARE MILLIONS OF ACCURATE RESULTS IN THE DATABASE.  
10:58AM 4 NOW, THE GOVERNMENT RESPONDS TO THAT, WELL, THAT YOU CAN'T  
10:58AM 5 KNOW FROM ANY ONE TEST RESULT IN THE DATABASE WHETHER IT WAS  
10:58AM 6 ACCURATE OR NOT. YOU KNOW, MAYBE IT WAS WITHIN A NORMAL RANGE,  
10:58AM 7 BUT THE PATIENT ACTUALLY SHOULD HAVE HAD AN ABNORMAL TEST  
10:58AM 8 RESULT, AND SO YOU CAN'T KNOW THAT IT'S ACCURATE. THAT'S THEIR  
10:58AM 9 RESPONSE.  
10:58AM 10 PERHAPS IT'S TRUE AS TO ONE INDIVIDUAL TEST RESULT, BUT  
10:58AM 11 WHEN YOU HAVE MILLIONS OF TEST RESULTS, YOU, OF COURSE, CAN  
10:58AM 12 PERFORM ANALYSES WITH THAT DATA THAT WOULD LEAVE A JURY TO  
10:58AM 13 CONCLUDE THAT THEY WERE ACCURATE AND RELIABLE.  
10:58AM 14 FOR EXAMPLE, YOU COULD IDENTIFY THE SPREAD OF TEST RESULTS  
10:58AM 15 THAT OCCURRED OVER VARIOUS REFERENCE RANGES AND DETERMINE HOW  
10:58AM 16 MANY OF THEM FELL WITHIN THE EXPECTED RANGE. WERE THERE AN  
10:58AM 17 EXTREME NUMBER OF OUTLIERS OR NOT? AND IF THERE WERE NOT, THAT  
10:59AM 18 WOULD BE PRETTY GOOD EVIDENCE TO A JURY THAT THESE TESTS WERE  
10:59AM 19 ACCURATE AND RELIABLE BECAUSE THEY FELL WITHIN THE EXPECTED  
10:59AM 20 RANGE. AND WE CAN'T --  
10:59AM 21 THE COURT: DID THE LIS -- I'M SORRY, MS. SAHARIA.  
10:59AM 22 MS. SAHARIA: YES.  
10:59AM 23 THE COURT: DID THE LIS ALLOW FOR THE INTRODUCTION  
10:59AM 24 OF THIRD PARTY TESTS?  
10:59AM 25 I THINK THE EVIDENCE SEEMS TO SHOW THAT THERE WERE THIRD

10:59AM 1 PARTY TESTS THAT WERE TAKEN FROM PATIENTS WHO, FOR WHATEVER  
10:59AM 2 REASON, WANTED TO GET A TEST OUTSIDE OF THERANOS, THEY GOT A  
10:59AM 3 DIFFERENT RESULT. AND JUST FOR PURPOSES OF OUR DISCUSSION,  
10:59AM 4 I'LL SAY THAT THEY BELIEVED THAT THAT THIRD PARTY TEST WAS MORE  
10:59AM 5 ACCURATE.

10:59AM 6 AND DID THE LIS CONTAIN INFORMATION SUCH THAT THE ACCURATE  
10:59AM 7 TESTS, THE THIRD PARTY TEST WAS REINTRODUCED INTO THE LIS?

10:59AM 8 MS. SAHARIA: I DON'T BELIEVE SO, YOUR HONOR. BUT  
10:59AM 9 IF I'M WRONG, MR. WADE CAN JUMP IN AND SAY SO.

11:00AM 10 THERE ARE CIRCUMSTANCES WHERE THERANOS ITSELF WOULD SEND  
11:00AM 11 CERTAIN TESTS OUT TO A THIRD PARTY VENDOR IF IT DIDN'T HAVE THE  
11:00AM 12 CAPACITY TO CONDUCT THAT PARTICULAR TEST. I UNDERSTAND THAT  
11:00AM 13 THAT IS COMMON IN THE LABORATORY INDUSTRY. THEY'RE CALLED  
11:00AM 14 REFERENCE LABS.

11:00AM 15 I THINK THAT INFORMATION WOULD BE INCLUDED IN THE  
11:00AM 16 LIS DATABASE. THAT IS IMPORTANT INFORMATION, THE PARTICULAR  
11:00AM 17 WAY THAT A TEST WAS CONDUCTED, WHICH DEVICE WAS IT CONDUCTED  
11:00AM 18 ON. WAS IT CONDUCTED ON THE THERANOS DEVICE OR WAS IT  
11:00AM 19 CONDUCTED ON A COMMERCIALLY AVAILABLE DEVICE? THAT'S CRITICAL  
11:00AM 20 INFORMATION THAT IS NOW LOST TO US BECAUSE -- TAKE ONE OF THE  
11:00AM 21 GOVERNMENT'S ANECDOTAL PATIENTS WHO IS GOING TO COME IN AND SAY  
11:00AM 22 THEIR TEST RESULT WAS INACCURATE. IF WE CAN SHOW AT THE LIS  
11:00AM 23 DATABASE THAT THAT TEST RESULT WAS NOT RUN ON A THERANOS DEVICE  
11:00AM 24 BUT WAS RUN ON SOME OTHER COMMERCIALLY AVAILABLE DEVICE, THAT  
11:01AM 25 WOULD BE PRETTY GOOD EVIDENCE THAT THE ERROR WAS NOT THE RESULT

11:01AM 1 OF THERANOS TECHNOLOGY, IT WAS THE RESULT OF SOME OTHER FACTOR.

11:01AM 2 SO WE CAN'T MEET THE GOVERNMENT'S ANECDOTES WITHOUT ACCESS

11:01AM 3 TO THE FULL RANGE OF LIS DATA THAT RELATES TO THESE TEST

11:01AM 4 RESULTS.

11:01AM 5 THE COURT: IS THAT ONE OF THE ALLEGATIONS THAT THE

11:01AM 6 GOVERNMENT MAKES THAT THERANOS WAS REPRESENTING THAT ALL OF THE

11:01AM 7 TESTS WERE DONE ON THEIR PROPRIETARY DEVICES WHEN, IN FACT,

11:01AM 8 THEY WERE DONE ON A SEPARATE DEVICE? SO WOULDN'T THAT BE

11:01AM 9 INculpating EVIDENCE?

11:01AM 10 MS. SAHARIA: WELL, WITH RESPECT TO THE PATIENT

11:01AM 11 COUNTS THAT WOULD BE EXCULPATING EVIDENCE, YOUR HONOR, BECAUSE

11:01AM 12 THEIR CLAIM IS THAT THERANOS TECHNOLOGY WAS INCAPABLE OF

11:01AM 13 PRODUCING ACCURATE AND RELIABLE RESULTS.

11:01AM 14 SO IF A PATIENT IS GOING TO COME IN AND TALK ABOUT AN

11:02AM 15 INACCURATE TEST RESULT BUT THE CAUSE OF THAT INACCURACY CANNOT

11:02AM 16 POSSIBLY BE THERANOS TECHNOLOGY, THAT WOULD BE EXCULPATORY

11:02AM 17 INFORMATION WITH RESPECT TO THAT INDIVIDUAL PATIENT BECAUSE IT

11:02AM 18 WOULD SHOW THE CAUSE MUST BE SOMETHING ELSE.

11:02AM 19 NOW, A FEW OTHER EXAMPLES. WITH RESPECT TO THE CMS

11:02AM 20 REPORT, FOR EXAMPLE, WE CAN'T ADEQUATELY REBUT THE GOVERNMENT'S

11:02AM 21 RELIANCE ON THE CMS REPORT WITHOUT ACCESS TO LIS BECAUSE THE

11:02AM 22 DATA, YOU KNOW, THE SMALL SAMPLES OF DATA THAT ARE REFLECTED IN

11:02AM 23 THE CMS REPORT OF COURSE CAME OUT OF LIS. THEY REFLECT

11:02AM 24 INFORMATION IN LIS, BUT THEY'RE ONLY FOR LIMITED TIME PERIODS.

11:02AM 25 AND WE LACK THE FULL DATA FROM LIS THAT WOULD BE NECESSARY TO

11:02AM 1 PUT THAT DATA IN CONTEST.

11:02AM 2 THE COURT: IS THERE SOME DATA FROM LIS THAT EXISTS

11:02AM 3 THAT RELATES TO CMS, THOUGH? I THOUGHT I READ SOMETHING THAT

11:02AM 4 SAID THAT THERE IS SOME DATA FROM THE LIS THAT EXISTS AND

11:03AM 5 PERHAPS THAT'S RELEVANT TO THE CMS?

11:03AM 6 MS. SAHARIA: WELL, THERE IS SOME DATA FROM CMS THAT

11:03AM 7 WAS PRODUCED -- EXCUSE ME, FROM LIS THAT WAS PRODUCED OVER THE

11:03AM 8 COURSE OF THE GOVERNMENT'S INVESTIGATION IN RESPONSE TO

11:03AM 9 SPECIFIC REQUESTS FOR SPECIFIC KINDS OF INFORMATION, BUT IT'S

11:03AM 10 NOT THE FULL RANGE OF DATA.

11:03AM 11 NOW, I THINK WHAT YOUR HONOR MIGHT BE THINKING OF IS THAT

11:03AM 12 THE GOVERNMENT HAS REPEATEDLY REFERRED TO POTENTIAL TESTIMONY

11:03AM 13 FROM THERANOS'S LAB DIRECTOR IN 2016. HIS NAME IS MR. DAS WHO

11:03AM 14 THEY WANT TO TESTIFY ABOUT VARIOUS ANALYSES THAT HE PERFORMED

11:03AM 15 FOLLOWING THE CMS REPORT, AND, OF COURSE, THOSE WOULD HAVE BEEN

11:03AM 16 PERFORMED USING DATA FROM THE LIS.

11:03AM 17 HOW ARE WE SUPPOSED TO CONFRONT HIS RECOLLECTION OF WHAT

11:03AM 18 ANALYSES HE PERFORMED OR TEST THE RELIABILITY OF HIS ANALYSES

11:04AM 19 WITHOUT ACCESS TO THE ACTUAL DATA ON WHICH HE BASED THOSE

11:04AM 20 ANALYSES?

11:04AM 21 THE LOSS OF THE LIS DATA IS QUITE EQUIVOCAL TO CONFRONTING

11:04AM 22 THAT KIND OF TESTIMONY THAT THEY WANT TO PUT AT ISSUE. AND

11:04AM 23 SIMILARLY WITH THE TESTIMONY OF DR. MASTER, IN HIS SUPPLEMENTAL

11:04AM 24 REPORT HE CONDUCTS VARIOUS CALCULATIONS THAT USES INPUT, OTHER

11:04AM 25 CALCULATIONS PERFORMED BY UNIDENTIFIED THERANOS WITNESSES THAT

11:04AM 1 THEY DID WITH THE LIS DATA. SO HE'S NOW TWO OR THREE STEPS  
11:04AM 2 REMOVED FROM THE LIS DATA PERFORMING CALCULATIONS, AND WITHOUT  
11:04AM 3 ACCESS TO THE LIS DATA, IT'S UNCLEAR HOW WE CAN TEST THE  
11:04AM 4 RELIABILITY OF THOSE CALCULATIONS.  
11:04AM 5 SO THERE ARE ALL SORTS OF WAYS IN WHICH OUR LACK OF ACCESS  
11:04AM 6 TO THE LIS DATA BOTH DEPRIVES US OF THE MOST CRITICAL  
11:04AM 7 EXONERATORY EVIDENCE IN THE CASE AND HINDERS OUR ABILITY TO  
11:04AM 8 CONFRONT THE GOVERNMENT'S WITNESSES, TO CONFRONT THE  
11:04AM 9 GOVERNMENT'S EVIDENCE.  
11:04AM 10 AND THEN WHAT IS ONE FINAL POINT WITH RESPECT TO THE  
11:05AM 11 PREJUDICE, AND I THINK THIS TOUCHES ON YOUR HONOR'S QUESTION  
11:05AM 12 ABOUT, YOU KNOW, KIND OF HOW THIS COULD PLAY OUT AT TRIAL. YOU  
11:05AM 13 KNOW, JUDGE KENNEDY RECOGNIZED IN LOUD HAWK THE VERY SEVERE  
11:05AM 14 PREJUDICE THAT CAN ACCRUE WHEN THIS KIND OF -- EVIDENCE ABOUT  
11:05AM 15 LOSS OF DATA OR LOSS OF EVIDENCE IS PRESENTED TO A JURY.  
11:05AM 16 NO MATTER HOW CLEAR IT IS, AND WE THINK IT'S CRYSTAL CLEAR  
11:05AM 17 THAT MS. HOLMES HAD NO ROLE IN THESE EVENTS, THERE IS A SEVERE  
11:05AM 18 RISK OF PREJUDICE TO MS. HOLMES IF WE HAVE TO LITIGATE THESE  
11:05AM 19 FACTS ABOUT WHO LOST THE DATA IN FRONT OF THE JURY. THE JURY  
11:05AM 20 MAY WELL SPECULATE ABOUT THE INTENTIONS OF THERANOS'S EMPLOYEES  
11:05AM 21 WITHOUT A PROPER BASIS FOR DOING SO, OR GOD FORBID, THEY MAY  
11:05AM 22 INFER THAT MS. HOLMES HAD SOMETHING TO DO WITH IT, EVEN THOUGH  
11:05AM 23 SHE DIDN'T, PERHAPS BECAUSE THE GOVERNMENT KEEPS TRYING TO  
11:06AM 24 INSINUATE THAT WITHOUT ANY FACTUAL BASIS FOR DOING THAT.  
11:06AM 25 IT WOULD BE VERY PREJUDICIAL FOR US TO HAVE TO LITIGATE

11:06AM 1 THESE ISSUES IN FRONT OF THE JURY, AND THAT'S WHY WE THINK THE  
11:06AM 2 APPROPRIATE COURSE IS FOR THE COURT TO HOLD AN EVIDENTIARY  
11:06AM 3 HEARING BEFORE TRIAL OUTSIDE OF THE JURY'S PRESENCE WHERE WE  
11:06AM 4 CAN DEVELOP THESE FACTS, AND THEN THE COURT CAN DETERMINE WITH  
11:06AM 5 ALL OF THE FACTS BEFORE IT, WHICH ARE NOT YET BEFORE THE COURT,  
11:06AM 6 WHAT THE APPROPRIATE REMEDY WOULD BE.

11:06AM 7 THE COURT: SO WE TALKED ABOUT THIS IN THE IN LIMINE  
11:06AM 8 MOTIONS, DIDN'T WE? AND I THINK IN MY RULING ON THIS  
11:06AM 9 PARTICULAR IN LIMINE MOTION THE COURT DEFERRED IT DEPENDENT ON  
11:06AM 10 WHETHER OR NOT THE DEFENSE WAS GOING TO INTRODUCE THIS IN YOUR  
11:06AM 11 CASE-IN-CHIEF. YOU MIGHT DECIDE TO -- AND I THINK I MENTIONED  
11:06AM 12 OPENING THE DOOR. IF YOU DECIDE TO BLAME THE GOVERNMENT FOR  
11:06AM 13 THIS AND VIS-A-VIS THE GOVERNMENT THE SAME THING, AND THAT'S A  
11:07AM 14 QUESTION, ISN'T IT? IT'S STILL AN OPEN ENDED QUESTION AS TO IF  
11:07AM 15 LIS IS GOING TO COME IN AT ALL.

11:07AM 16 IF IT DOESN'T COME IN, THEN WHAT YOU HAVE, AS I SUGGESTED  
11:07AM 17 EARLIER, IS YOUR BATTLE OF ANECDOTAL DOCTORS TALKING ABOUT THE  
11:07AM 18 ANECDOTAL INFORMATION, AND THE JURY CAN THEN DECIDE JUST BASED  
11:07AM 19 ON THAT INFORMATION AT LEAST FOR WHATEVER ISSUE IT PRESENTS.

11:07AM 20 SO IF THE LIS DOESN'T COME IN, IT SEEMS LIKE YOU'RE ON  
11:07AM 21 EVEN GROUND.

11:07AM 22 MS. SAHARIA: WELL, I RESPECTFULLY DISAGREE BECAUSE  
11:07AM 23 THE GOVERNMENT WANTS TO PRESENT EVIDENCE ALL OF WHICH TIES BACK  
11:07AM 24 TO THE LIST. THEY WANT TO PRESENT THE EVIDENCE OF DR. MASTER  
11:07AM 25 THAT TIES BACK TO THE LIST. THEY WANT TO PRESENT THE EVIDENCE

11:07AM 1 OF DR. DAS, A THERANOS EMPLOYEE THAT TIES BACK TO THE LIS.

11:07AM 2 THEY WANT TO PRESENT THESE ANECDOTES THAT WE CAN'T, WE CAN'T

11:07AM 3 FULLY CONFRONT THE ANECDOTES WITHOUT KNOWING THE INFORMATION

11:08AM 4 ABOUT THEM IN THE LIS.

11:08AM 5 SO I DON'T THINK THAT WE'RE ON AN EVEN PLAYING FIELD JUST

11:08AM 6 BECAUSE BOTH PARTIES LACK ACCESS TO THE LIS.

11:08AM 7 NOW, THE COURT DID RECOGNIZE IN ITS RULING A COUPLE OF

11:08AM 8 THINGS THAT I THINK ARE RELEVANT TO THIS DISCUSSION.

11:08AM 9 YOU'RE ABSOLUTELY RIGHT THAT THE COURT DID NOTE THAT THE

11:08AM 10 DEFENSE MIGHT DECIDE TO PUT THE BLAME FOR THE LOSS OF THE

11:08AM 11 EVIDENCE AT ISSUE. THAT, OF COURSE, IS A JUDGMENT CALL THAT WE

11:08AM 12 HAVEN'T MADE, AND I THINK OUR PREFERENCE IS TO AVOID THIS

11:08AM 13 ENTIRE SIDESHOW AT TRIAL, BUT I DO THINK THAT THAT HIGHLIGHTS

11:08AM 14 THE IMPORTANCE OF OUR MOTION TO COMPEL. THE INFORMATION IN THE

11:08AM 15 GOVERNMENT'S BRADY LETTER THAT HAS STILL NOT BEEN PRODUCED TO

11:08AM 16 US, WHICH, NAMELY, ARE THE DOCUMENTS THAT UNDERLIE THAT BRADY

11:08AM 17 LETTER THAT THE GOVERNMENT REFUSES TO PRODUCE AND EVEN THE

11:08AM 18 IDENTITIES OF THE PEOPLE NAMED IN THE BRADY LETTER, HOW CAN WE

11:08AM 19 EXERCISE A JUDGMENT ABOUT WHETHER OR NOT TO PRODUCE EVIDENCE AT

11:08AM 20 TRIAL OR TO CALL WITNESSES ON THIS ISSUE IF THE GOVERNMENT

11:09AM 21 REFUSES TO TELL US WHO THE WITNESS ARE AND REFUSES TO ACTUALLY

11:09AM 22 GIVE US THE EVIDENCE?

11:09AM 23 SO I DO THINK THAT THAT ISSUE HIGHLIGHTS WHY THE COURT

11:09AM 24 SHOULD GRANT THE MOTION TO COMPEL, WHETHER OR NOT THE COURT

11:09AM 25 EVEN HOLDS A HEARING, WE THINK THAT MOTION TO COMPEL IS

11:09AM 1 RELEVANT TO TRIAL.

11:09AM 2 NOW, THE COURT DID SEPARATELY NOTE, APPROPRIATELY SO, THAT

11:09AM 3 WE ARE ENTITLED TO HOLD THE GOVERNMENT TO ITS BURDEN AT TRIAL.

11:09AM 4 WE, OF COURSE, HAVE THE FULL CAPABILITY TO ARGUE THAT THEY HAVE

11:09AM 5 FAILED TO MEET THAT BURDEN BECAUSE THEY'VE PRESENTED AN

11:09AM 6 ANECDOTAL CASE THAT IS LACKING IN DATA. I THINK IT'S

11:09AM 7 INEVITABLE THAT THE JURY WILL HEAR THAT THERE WAS SUCH A

11:09AM 8 DATABASE, THAT THERE WAS AN LIS DATABASE, AND THE JURY WILL NO

11:09AM 9 DOUBT APPRECIATE THAT THE DATABASE IS NOT BEFORE THEM. AND I

11:09AM 10 THINK IT IS APPROPRIATE FOR THE DEFENSE, YOU KNOW, WHETHER OR

11:10AM 11 NOT EVIDENCE IS SUPPRESSED, I THINK IT'S APPROPRIATE FOR THE

11:10AM 12 DEFENSE TO HOLD THE GOVERNMENT TO ITS BURDEN BY ARGUING TO THE

11:10AM 13 JURY THAT THE DATA IS NOT BEFORE THE JURY, AND THE GOVERNMENT

11:10AM 14 HAS NOT PRESENTED THAT DATA TO THE JURY WITHOUT BLAMING ANYONE

11:10AM 15 FOR WHY IT'S -- THE GOVERNMENT IS NOT PRESENTING THAT DATA TO

11:10AM 16 THE JURY. I THINK THE DEFENSE HAS TO BE ABLE TO MAKE THAT

11:10AM 17 ARGUMENT.

11:10AM 18 BUT AGAIN, I THINK THE FACT THAT THAT ARGUMENT IS

11:10AM 19 CRITICALLY AN IMPORTANT ARGUMENT TO THE DEFENSE JUST HIGHLIGHTS

11:10AM 20 THAT THE REAL DANGER THAT THE JURY WILL SPECULATE AND DRAW

11:10AM 21 INCORRECT INFERENCES FROM THE LACK OF DATA, WHICH IS WHY WE

11:10AM 22 THINK THE ONLY APPROPRIATE REMEDY FOLLOWING A HEARING WOULD BE

11:10AM 23 A SUPPRESSION.

11:10AM 24 THE COURT: OKAY. THANK YOU VERY MUCH, MS. SAHARIA.

11:10AM 25 MS. SAHARIA: THANK YOU, YOUR HONOR.

11:10AM 1 THE COURT: YOU'RE WELCOME.

11:10AM 2 MR. WADE: YOUR HONOR, I APOLOGIZE. THIS WOULD BE

11:10AM 3 ONE OF THOSE MOMENTS WHERE IN A CONVENTIONAL HEARING I WOULD

11:10AM 4 PASS MS. SAHARIA A NOTE.

11:11AM 5 BUT WITH RESPECT TO THE PRIVILEGE ISSUE THAT WAS RAISED,

11:11AM 6 IF I MIGHT ADDRESS THAT JUST VERY -- FOR 30 SECONDS? AND THAT

11:11AM 7 IS JUST TO SAY MS. SAHARIA WAS NOT INVOLVED, I THINK, IN THE

11:11AM 8 REPRESENTATION DURING THIS TIME PERIOD BETWEEN THE INDICTMENT

11:11AM 9 AND THE SO-CALLED "DECOMMISSIONING OF THE LIS" OR IN OTHER

11:11AM 10 WORDS PUTTING THE LIS IN THE STORAGE FACILITY, WHICH IS HOW I

11:11AM 11 WOULD REFER TO IT.

11:11AM 12 TO THE EXTENT THAT THE COURT HAS INQUIRIES WITH RESPECT TO

11:11AM 13 MS. HOLMES'S KNOWLEDGE OF AND ACCESS TO THAT DATA AND HER

11:11AM 14 PARTICIPATION IN SUBPOENA COMPLIANCE OR LACK THEREOF GIVEN HER

11:11AM 15 STATUS IN THE INVESTIGATION, WE WOULD BE HAPPY TO PROVIDE A

11:11AM 16 PROFFER TO THE COURT IN CAMERA EX PARTE ON THAT. I THINK IT

11:11AM 17 WOULD ADDRESS ANY OF THE COURT'S CONCERNs.

11:11AM 18 I DON'T THINK IT WOULD BE FAIR TO DRAW ANY ADVERSE

11:11AM 19 INFERENCE FROM MS. HOLMES NOT CURRENTLY POSSESSING THE LIS.

11:12AM 20 AND IF THE COURT WERE INTENDING TO DO THAT, WE WOULD REQUEST

11:12AM 21 THE OPPORTUNITY TO JUST ADDRESS THAT BECAUSE I THINK AN

11:12AM 22 EX PARTE HEARING WHERE WE EXCHANGE FOR TWO MINUTES ON THE

11:12AM 23 PRIVILEGE ISSUES WOULD MORE THAN ADDRESS THE COURT'S CONCERN.

11:12AM 24 THE COURT: WELL, THANK YOU. I WAS NOT INTENDING --

11:12AM 25 IT WAS NOT MY INTENT TO BROACH A PRIVILEGE TOPIC.

11:12AM 1 AND, MS. SAHARIA, PLEASE KNOW THAT, THAT WAS NOT MY  
11:12AM 2 INTENT, NOR, MR. WADE, THAT WAS NOT MY INTENT. I WAS JUST  
11:12AM 3 TRYING TO GET THE FACTUAL SCENARIO DOWN. THE DATES, THE  
11:12AM 4 TIMELINE OF WHAT OCCURRED I THINK SPEAK PERHAPS SUFFICIENT  
11:12AM 5 EVIDENCE FOR THE COURT TO CONSIDER THE MOTION HERE.  
11:12AM 6 I THINK WE KNOW THAT THE EVIDENCE SHOWS THAT ON INDICTMENT  
11:12AM 7 IT WAS JUNE 14TH OR JUNE 18TH, WHATEVER IT WAS, I THINK  
11:12AM 8 MS. HOLMES STEPPED DOWN AS CEO. I THINK THERE IS INFORMATION  
11:12AM 9 IN THE DOCUMENTS I'VE READ THAT SUGGESTS THAT SHE REMAINED AS  
11:12AM 10 PRESIDENT OF THE BOARD, BUT SHE DID STEP DOWN AS CEO AT THE  
11:13AM 11 TIME. I RECOGNIZE THAT.  
11:13AM 12 MY QUESTION TO MS. SAHARIA WAS REGARDING -- I THINK IT WAS  
11:13AM 13 THE PREJUDICE. THAT'S WHAT MOVED US TO THE PREJUDICE  
11:13AM 14 CONVERSATION AROUND THE FACTS THAT AT THE TIME OF THE  
11:13AM 15 DECOMMISSION. I WISH IT WAS AS SIMPLE AS JUST PUTTING IN  
11:13AM 16 STORAGE BECAUSE, MR. WADE, WE COULD JUST GET IT OUT OF STORAGE  
11:13AM 17 AND OPEN IT UP AND THAT WOULD RESOLVE ALL OF THIS, BUT  
11:13AM 18 APPARENTLY IT'S NOT THAT EASY.  
11:13AM 19 THE QUESTION WAS AT THE TIME THAT IT WAS DECOMMISSIONED  
11:13AM 20 AND PRIOR TO THE DECOMMISSION, AS EARLY AS JUNE WHEN THERE WAS  
11:13AM 21 NOTICE OF THE INDICTMENT, CERTAINLY THE IMPORTANCE OF THE LIS  
11:13AM 22 WAS CERTAINLY KNOWN TO THE DEFENSE. AND FOR A PREJUDICE  
11:13AM 23 ANALYSIS THE QUESTION WAS, WELL, THERE WAS PRIVITY THERE AND  
11:13AM 24 DOESN'T THAT SUGGEST THAT, NOT FAULT, BUT THERE WAS AN  
11:13AM 25 OPPORTUNITY TO PRESERVE WAS THE POINT THAT I WAS TRYING TO

11:14AM 1 MAKE. THAT'S IT.

11:14AM 2 BUT THANK YOU FOR YOUR -- I APPRECIATE THE OFFER ABOUT IN

11:14AM 3 CAMERA. I DON'T THINK IT'S NEEDED JUST NOW.

11:14AM 4 LET'S TURN TO THE GOVERNMENT.

11:14AM 5 MR. WADE: YOUR HONOR, IF I MIGHT JUST SO THE RECORD

11:14AM 6 IS CLEAR ON THIS POINT. I INFER FROM THE COURT'S COMMENT THAT

11:14AM 7 THERE IS AN INFERENCE THAT MS. HOLMES HAD ACCESS TO THE LIS

11:14AM 8 DURING THAT TIME PERIOD.

11:14AM 9 THE COURT: OH. NO. MR. WADE, THAT'S NOT WHAT I

11:14AM 10 SAID. MR. WADE, THAT'S NOT WHAT I SAID, SIR. THAT'S NOT WHAT

11:14AM 11 I SAID THAT SHE HAD ACCESS TO IT.

11:14AM 12 I WAS STATING THE FACTS THAT SHE WAS STILL AT THE TIME,

11:14AM 13 SHE WAS -- THE RECORD WILL REFLECT THAT SHE WAS CEO OR WHATEVER

11:14AM 14 SHE WAS.

11:14AM 15 YOU RECALL IN MY ORDER ON THE IN LIMINE MOTIONS, I THINK I

11:14AM 16 GRANTED YOUR RELIEF. I SAID THERE HAS TO BE A NEXUS, SOME TYPE

11:14AM 17 OF A SHOWING OF A CONNECTION TO YOUR CLIENT AND THE LIS, AND

11:14AM 18 THAT STILL HOLDS TRUE. SO I THINK THAT -- I HOPE THAT ANSWERS

11:14AM 19 YOUR QUESTION.

11:15AM 20 MR. BOSTIC.

11:15AM 21 MR. WADE: THANK YOU, YOUR HONOR.

11:15AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:15AM 23 I'LL START WITH JUST A FEW OF THE RELEVANT FACTS, AND I

11:15AM 24 THINK THE COURT HAS HIT SOME OF THE KEY ISSUES HERE OR ALL OF

11:15AM 25 THE KEY ISSUES.

11:15AM 1 JUST SO WE'RE CLEAR ON THE TIMELINE, THE GRAND JURY  
11:15AM 2 SUBPOENAED THE RESULTS FROM THE LABORATORY INFORMATION SYSTEM,  
11:15AM 3 THE LIS, IN APRIL OF 2018. THAT SUBPOENA CALLED FOR THE ENTIRE  
11:15AM 4 UNIVERSE OF LAB RESULTS FROM THE LIS. SO THAT REQUEST, THAT  
11:15AM 5 SUBPOENA WAS PENDING AS TO THERANOS FROM APRIL 2018 GOING  
11:15AM 6 FORWARD.

11:15AM 7 LATER AS A RESULT OF DISCUSSIONS BETWEEN GOVERNMENT  
11:15AM 8 COUNSEL AND THERANOS COUNSEL, THE GOVERNMENT SERVED OR RATHER  
11:15AM 9 THE GRAND JURY ISSUED ANOTHER SUBPOENA WHICH THE GOVERNMENT  
11:15AM 10 SERVED REQUESTING A SOFT COPY OF THE DATABASE ITSELF. SO THE  
11:15AM 11 DATABASE IN NATIVE FORM, ELECTRONIC FORM THAT WOULD HAVE  
11:15AM 12 INCLUDED THAT SAME INFORMATION BUT WITH MORE CAPABILITY FOR  
11:15AM 13 SORTING AND SEARCHING. SO THAT REQUEST WAS AT THE BEGINNING OF  
11:16AM 14 THE JUNE, THAT SUBPOENA.

11:16AM 15 THE LIS COPY WAS PRODUCED TO THE GOVERNMENT MONTHS LATER,  
11:16AM 16 AT THE END OF AUGUST 2018, SEVERAL MONTHS AFTER THE GOVERNMENT  
11:16AM 17 SERVED THE SUBPOENA REQUESTING ALL RESULTS FROM THE LIS.

11:16AM 18 AROUND THAT SAME TIME THE GOVERNMENT WAS IN CONTACT WITH  
11:16AM 19 THERANOS COUNSEL ABOUT OBTAINING SOME EXEMPLARS OF THERANOS  
11:16AM 20 ANALYZERS, AND THE DEFENSE HIGHLIGHTED THIS I THINK IN AN  
11:16AM 21 EFFORT TO SUGGEST THAT THE GOVERNMENT SHOULD HAVE OR A  
11:16AM 22 REASONABLE PROSECUTOR WOULD HAVE TAKEN THE SAME APPROACH AS TO  
11:16AM 23 THE SERVERS HOUSING THE LIS THAT IT DID AS TO THOSE THERANOS  
11:16AM 24 ANALYZERS, BUT THIS IS APPLES AND ORANGES IN A WAY THAT I THINK  
11:16AM 25 IS CLEAR.

11:16AM 1 IN COLLECTING INFORMATION FROM THERANOS IN THE FORM OF LAB  
11:16AM 2 RESULTS OR EMAILS OR OTHER INTERNAL DOCUMENTS, WE'RE TALKING  
11:16AM 3 ABOUT ELECTRONICALLY STORED INFORMATION, ESI, WHICH IS  
11:17AM 4 SOMETHING THAT LAWYERS AND INVESTIGATORS DEAL WITH REGULARLY.  
11:17AM 5 IN COLLECTING THAT INFORMATION THE TYPICAL APPROACH, OF COURSE,  
11:17AM 6 IS NOT TO GO IN AND SEIZE THE PHYSICAL DEVICES THEMSELVES,  
11:17AM 7 ESPECIALLY WHEN THE BUSINESS IS OPERATING AND THAT WOULD BE  
11:17AM 8 DISRUPTIVE TO THAT BUSINESS.  
11:17AM 9 SO IT'S VERY COMMON AND STANDARD FOR ESI PRODUCTION TO BE  
11:17AM 10 HANDLED BY TRANSFERRING AN ELECTRONIC COPY OF THAT INFORMATION.  
11:17AM 11 ESI CAN BE COPIED BY ITS VERY NATURE.  
11:17AM 12 MOREOVER, WITH ALMOST ALL ESI, CERTAINLY ALL ESI THAT I'VE  
11:17AM 13 HAD EXPERIENCE WITH OTHER THAN THIS DATABASE, MOVING THE  
11:17AM 14 HARDWARE THAT CONTAINS THAT ESI DOESN'T DISRUPT OR DESTROY THE  
11:17AM 15 ESI. AND THAT WAS PROVEN IN THIS CASE, THE ASSIGNEE, WHEN IT  
11:17AM 16 TOOK OVER THERANOS'S ASSETS, DID SUCCESSFULLY OBTAIN A LARGE  
11:17AM 17 AMOUNT OF THERANOS'S NON-LIS, ELECTRONICALLY STORED  
11:17AM 18 INFORMATION.  
11:17AM 19 SO THERE WAS NO NOTICE TO THE GOVERNMENT THAT THE  
11:17AM 20 SHUDDERING OF THERANOS WOULD RESULT IN THE LOSS OF THIS  
11:18AM 21 INFORMATION, JUST TO MAKE THAT CLEAR, AND I THINK THE COURT  
11:18AM 22 NOTED THAT ALREADY.  
11:18AM 23 IN CONTRAST, THE THERANOS ANALYZERS, THE EXEMPLARS OF THE  
11:18AM 24 EDISON, THE DIFFERENT VERSIONS OF THE TSPU, THE GOVERNMENT  
11:18AM 25 NEEDED TO OBTAIN THOSE FOR THE SAKE OF HAVING THOSE PIECES OF

11:18AM 1 EVIDENCE, THE PHYSICAL DEVICES THEMSELVES. THAT WASN'T TO  
11:18AM 2 OBTAIN ESI STORED ON THOSE DEVICES. SO THAT EXPLAINS THE  
11:18AM 3 DIFFERENT APPROACH.

11:18AM 4 THE ASSIGNEE WENT LIVE A COUPLE OF WEEKS AFTER THE COPY OF  
11:18AM 5 THE LIS WAS PRODUCED TO THE GOVERNMENT. THE GOVERNMENT WAS  
11:18AM 6 UNABLE TO ACCESS THE LIS OR AT LEAST THE COPY THAT IT OBTAINED,  
11:18AM 7 AND AS A RESULT IT CONSULTED WITH THERANOS COUNSEL SHORTLY  
11:18AM 8 AFTER OBTAINING IT, AND THEN LATER WITH ASSIGNEE COUNSEL TO TRY  
11:18AM 9 TO GET HELP WITH ACCESSING THAT INFORMATION.

11:18AM 10 THOSE RESULTS OR THOSE EFFORTS WERE ULTIMATELY FUTILE.  
11:18AM 11 AND THAT'S THE REAL POINT HERE THAT THE DEFENSE IS ATTEMPTING  
11:18AM 12 TO, I THINK, INVITE THE COURT TO PENALIZE THE GOVERNMENT FOR  
11:19AM 13 NOT GOING FURTHER DOWN ROADS THAT WOULD HAVE BEEN DEAD ENDS OR  
11:19AM 14 ROADS THAT WERE INDICATING THAT THEY WERE DEAD ENDS, FIRST AS  
11:19AM 15 TO THE COPY OF THE LIS THAT THE GOVERNMENT DID OBTAIN, AND,  
11:19AM 16 SECOND, AS TO THE ORIGINAL VERSION OF THE LIS THAT WAS  
11:19AM 17 DECOMMISSIONED OR REALLY IN EFFECT DESTROYED BY THERANOS IN  
11:19AM 18 AUGUST 2018. SO I'LL TAKE THOSE TWO COPIES ONE AFTER THE OTHER  
11:19AM 19 JUST TO MAKE SURE THAT WE'RE CLEAR ON HOW THOSE WERE DEAD ENDS.

11:19AM 20 AS TO THE GOVERNMENT COPY, SO THE GOVERNMENT ATTEMPTED TO  
11:19AM 21 GAIN ACCESS TO THE LIS COPY THAT THERANOS GAVE IT WITHIN WEEKS.  
11:19AM 22 THE GOVERNMENT SUBMITS THAT'S A REASONABLE TIME GIVEN THE  
11:19AM 23 VOLUME OF EVIDENCE IN THIS CASE AND THE OTHER EVENTS THAT WERE  
11:19AM 24 HAPPENING AT THAT TIME.

11:19AM 25 THAT COPY, HOWEVER, WAS DOUBLE ENCRYPTED, AND THE

11:19AM 1 GOVERNMENT WAS NOT INFORMED OF THAT ENCRYPTION STATUS OR OF THE  
11:19AM 2 EXISTENCE OF A SECOND ENCRYPTION KEY THAT WOULD BE NEEDED IN  
11:19AM 3 ORDER TO ACCESS THOSE FILES.

11:19AM 4 DESPITE THE FACT THAT IN ITS REQUEST TO THERANOS THE  
11:20AM 5 GOVERNMENT HAD ASKED FOR NOT JUST THE DATABASE BUT ALSO  
11:20AM 6 ANYTHING THAT WAS REQUIRED TO ACCESSING, INCLUDING ANY SOFTWARE  
11:20AM 7 THAT WAS REQUIRED TO ACCESS IT.

11:20AM 8 THAT COPY OF THE LIS, THE COPY RECEIVED FROM THERANOS, HAS  
11:20AM 9 ALSO, BY THE WAY, BEEN PRODUCED TO THE DEFENSE. SO THE DEFENSE  
11:20AM 10 IN THIS CASE HAS THE SAME INFORMATION THAT THE GOVERNMENT HAS,  
11:20AM 11 THE SAME VERSION OF THE LIS.

11:20AM 12 SO I'M CONFUSED TO HEAR THE DEFENSE COMPLAIN ABOUT THE  
11:20AM 13 GOVERNMENT'S LACK OF EFFORTS TO ACCESS THAT DEVICE, THAT COPY,  
11:20AM 14 BECAUSE THE DEFENSE HAS EQUIVALENT, IDENTICAL ACCESS TO THAT  
11:20AM 15 SAME INFORMATION. AND IF IT WERE ACCESSIBLE, PRESUMABLY WE  
11:20AM 16 WOULDN'T BE IN THIS SITUATION BECAUSE THE GOVERNMENT, OR EXCUSE  
11:20AM 17 ME, THE DEFENSE WOULD HAVE GONE THROUGH THE EFFORTS THAT IT  
11:20AM 18 WANTED THE GOVERNMENT TO GO THROUGH, OBTAINED ACCESS TO THAT  
11:20AM 19 DATABASE, THAT COPY OF THE DATABASE, AND THUS THERE WOULD BE NO  
11:20AM 20 PREJUDICE TO THE DEFENSE BECAUSE THE DEFENDANT WOULD HAVE  
11:20AM 21 ACCESS TO IT.

11:21AM 22 THE FACT THAT THE DEFENSE APPARENTLY HAS BEEN EQUALLY  
11:21AM 23 UNSUCCESSFUL IN ACCESSING THAT COPY OF THE DATABASE JUST PROVES  
11:21AM 24 THAT THAT COPY ITSELF WAS A DEAD END. IT WAS NOT A VIABLE COPY  
11:21AM 25 OF THE DATABASE. SO THERE'S REALLY NO POINT IN SCRUTINIZING

11:21AM 1 THE GOVERNMENT'S CONDUCT AS TO ITS EFFORTS TO ACCESS THAT COPY  
11:21AM 2 BECAUSE IT'S ALL MOOT. NO PREJUDICE RESULTED FROM ANY LACK OF  
11:21AM 3 EFFORT THERE, BECAUSE NO MATTER WHAT EFFORT WAS EXPENDED, THOSE  
11:21AM 4 COPIES, THE COPY THAT WE HAVE, THE COPY THAT WE GAVE TO THE  
11:21AM 5 DEFENSE, OUR UNDERSTANDING IS THAT THEY'RE JUST NOT VIABLE,  
11:21AM 6 THEY CANNOT BE ACCESSED, ESPECIALLY WITHOUT THE SECOND  
11:21AM 7 ENCRYPTION KEY THAT, YOU KNOW, FOR WHICH THERE'S NO TRACE.  
11:21AM 8 LET ME MOVE TO THE ORIGINAL COPY THEN, THE COPY OF THE LIS  
11:21AM 9 THAT THERANOS USED, THE COPY THAT WAS STORED AT THERANOS ON  
11:21AM 10 HARDWARE, DISASSEMBLED BY THERANOS AFTER FOUR DAYS OF  
11:22AM 11 PRODUCTION TO THE GOVERNMENT. AS GOOD AS CONTEMPORANEOUSLY,  
11:22AM 12 I'M LEAVING A VERY NARROW WINDOW FOR THE GOVERNMENT TO  
11:22AM 13 UNDERSTAND AND REALIZE THAT WHAT IT HAD WAS NOT VIABLE AND THEN  
11:22AM 14 TAKE THE STEPS NEEDED TO ANTICIPATE, PREDICT, AND THEN PREVENT  
11:22AM 15 THERANOS FROM DESTROYING OR DISABLING THE ORIGINAL VERSION OF  
11:22AM 16 THE LIS. THAT'S A CRITICAL TIME PERIOD. AND I THINK THE COURT  
11:22AM 17 IS RIGHT TO FOCUS ON THAT THREE- OR FOUR-DAY PERIOD AND ASK  
11:22AM 18 WHAT WOULD WE EXPECT? WHAT SHOULD WE DEMAND THAT THE  
11:22AM 19 GOVERNMENT HAD DONE DURING THAT NARROW TIME PERIOD?  
11:22AM 20 BEFORE THERANOS TOOK THAT ACTION TO DECOMMISSION THE LIS,  
11:22AM 21 THE EVIDENCE IN THE RECORD SHOWS THAT THERANOS EMPLOYEES KNEW  
11:22AM 22 THAT SHUTTING DOWN THE DATABASE WOULD LIKELY BE A PERMANENT  
11:22AM 23 MOVE. THEY WENT FORWARD ANYHOW.  
11:22AM 24 THE ASSIGNEE TOOK OVER THERANOS'S ASSETS A COUPLE OF WEEKS  
11:22AM 25 LATER. THE GOVERNMENT IS AWARE AND HAS SHARED THIS INFORMATION

11:22AM 1 WITH THE DEFENSE THAT BY MID SEPTEMBER THE ASSIGNEE WAS  
11:23AM 2 INVESTIGATING THE LIS PARTLY IN RESPONSE TO REQUESTS FROM  
11:23AM 3 PLAINTIFFS IN CIVIL CASES. AND THE ASSIGNEE, DESPITE ITS  
11:23AM 4 EFFORTS IN COORDINATING WITH THERANOS COUNSEL, CONTINUED TO BE  
11:23AM 5 UNABLE TO GAIN ANY REAL OR MEANINGFUL ACCESS TO THAT LIS  
11:23AM 6 INFORMATION.

11:23AM 7 BY MID OCTOBER THERANOS OUTSIDE COUNSEL AT WILMER HALE  
11:23AM 8 CONFIRMED FOR THE ASSIGNEE THAT THEY COULDN'T ACCESS THE LIS  
11:23AM 9 BECAUSE IT WAS DOUBLE ENCRYPTED. SO WE KEEP COMING BACK TO  
11:23AM 10 THIS ISSUE JUST LIKE THE COPY PRODUCED TO THE GOVERNMENT, THE  
11:23AM 11 ORIGINAL COPY WAS DOUBLE ENCRYPTED, REQUIRED THIS PARTICULAR  
11:23AM 12 ENCRYPTION KEY IN ORDER TO GAIN ACCESS, AND IT'S UNKNOWN WHERE  
11:23AM 13 THAT KEY WAS, WHETHER IT HAD BEEN LOST ENTIRELY. SO IT'S  
11:23AM 14 COMPLETELY SPECULATIVE TO GUESS OR SUGGEST THAT EFFORTS BY THE  
11:23AM 15 GOVERNMENT TARGETED AT THAT ORIGINAL COPY, THAT ORIGINAL  
11:23AM 16 HARDWARE, WOULD HAVE PRODUCED ANY RESULTS.

11:23AM 17 THE DEFENSE REFERENCES WITNESS STATEMENTS SPECULATING THAT  
11:24AM 18 THAT ORIGINAL COPY COULD HAVE BEEN RESURRECTED. BUT IF THE  
11:24AM 19 COURT LOOKS AT THOSE STATEMENTS, I THINK THE COURT WILL SEE  
11:24AM 20 THAT THEY DON'T OR DON'T MERIT MUCH WEIGHT.

11:24AM 21 FIRST, NONE OF THOSE STATEMENTS ADDRESS THE NEED FOR THE  
11:24AM 22 ENCRYPTION KEY AND THE DOUBLE ENCRYPTED STATUS OF THAT  
11:24AM 23 DATABASE. TO THE EXTENT THAT A WITNESS THOUGHT THAT THE  
11:24AM 24 DATABASE MIGHT BE ABLE TO BE RESURRECTED, IT DOES NOT ACCOUNT  
11:24AM 25 FOR AND DOESN'T PROVIDE A SOLUTION FOR THAT DOUBLE ENCRYPTED

11:24AM 1 STATUS.

11:24AM 2 ONE OF THE STATEMENTS THAT DEFENDANTS OR THE DEFENDANT

11:24AM 3 RELIES ON IS FROM A LAWYER WHO IN THAT SAME PROFFER TO THE

11:24AM 4 GOVERNMENT ADMITTED THAT HE DIDN'T HAVE A STRONG TECHNICAL

11:24AM 5 BACKGROUND, SO HE WAS JUST GIVING INFORMATION BASED ON HIS

11:24AM 6 UNDERSTANDING AT THE TIME, NOT TRYING TO ACT AS AN EXPERT TO

11:24AM 7 EXPLAIN WHAT WAS ACTUALLY POSSIBLE.

11:24AM 8 AS TO THE OTHER INDIVIDUALS WHO HAVE SOME MORE TECHNICAL

11:24AM 9 QUALIFICATIONS, ONE SAID HE DIDN'T THINK IT WOULD BE DIFFICULT

11:25AM 10 AT THE TIME THAT THE DATABASE WAS SHUT DOWN, BUT DIDN'T REALLY

11:25AM 11 PROVIDE AN OPINION THAT IT COULD HAVE BEEN RECONSTRUCTED

11:25AM 12 AFTERWARDS OR DIDN'T PROVIDE A CONTEMPORANEOUS OPINION AS OF

11:25AM 13 TODAY THAT HE THOUGHT IT REMAINED VIABLE AFTER IT WAS

11:25AM 14 DECOMMISSIONED.

11:25AM 15 ANOTHER SAID THAT HE THOUGHT THAT REASSEMBLING THE

11:25AM 16 DATABASE WOULD BE VERY DIFFICULT, BUT AGAIN, HE ALSO

11:25AM 17 SPECIFICALLY SAID THAT IT WOULD BE IMPOSSIBLE WITHOUT THE

11:25AM 18 PRIVATE ENCRYPTION KEY. SO AGAIN, WE COME BACK TO THE

11:25AM 19 ENCRYPTION KEY THAT WAS NEVER PROVIDED TO THE GOVERNMENT AND OF

11:25AM 20 WHICH THE GOVERNMENT WAS NOT EVEN INFORMED.

11:25AM 21 SO THANKS TO THERANOS'S ACTIONS, THANKS TO THE ACTIONS OF

11:25AM 22 DEFENDANT'S COMPANY, THE ORIGINAL COPY OF THE LIS TURNED INTO A

11:25AM 23 DEAD END. THANKS TO THE FORMAT IN WHICH IT WAS PRODUCED TO THE

11:25AM 24 GOVERNMENT, AND THE LACK OF THE COMPANY INFORMATION, THAT COPY

11:25AM 25 OF THE LIS WAS A DEAD END AS WELL. THAT'S WHY WE'RE IN THIS

11:25AM 1 SITUATION.

11:25AM 2 SO TO SAY TO THE COURT, WELL, WE NEED TO DELVE FURTHER

11:26AM 3 INTO THE GOVERNMENT'S ACTIONS PURSUING THOSE TWO DEAD ENDS

11:26AM 4 DOESN'T MAKE SENSE, IT'S NOT RELEVANT TO THE INQUIRY, IT HAS NO

11:26AM 5 EFFECT ON THE PREJUDICE TO THE DEFENDANT, THE ALLEGED

11:26AM 6 PREJUDICE, AND WE SUBMIT IT WOULD BE A WASTE OF TIME.

11:26AM 7 THE COURT: ALL RIGHT. DO YOU WANT TO SPEAK TO THE

11:26AM 8 BRADY ISSUE?

11:26AM 9 MR. BOSTIC: YES, YOUR HONOR, I'M HAPPY TO COVER THE

11:26AM 10 BRADY ISSUE.

11:26AM 11 SO HERE THERE'S SOME TENSION IN THE DEFENDANT'S POSITION,

11:26AM 12 AND, FRANKLY, THE IDEA THAT ON THE ONE HAND THE DEFENSE IS

11:26AM 13 ATTEMPTING TO USE THE FULSOMENESS OF THE GOVERNMENT'S

11:26AM 14 DISCLOSURE AS A CONCESSION AS AN ADMISSION OF WRONGDOING WHILE

11:26AM 15 ON THE OTHER HAND SAYING WE NEED MORE INFORMATION, THE COURT

11:26AM 16 SHOULD ORDER THAT THE GOVERNMENT NEEDS TO OPEN ITS FILES TO THE

11:26AM 17 DEFENSE SO THAT THE DEFENSE CAN PERUSE AND LOOK FOR ADDITIONAL

11:26AM 18 INFORMATION THAT MIGHT BE HELPFUL ON THIS ISSUE I THINK SHOULD

11:27AM 19 RAISE SOME CONCERNS WITH THE COURT.

11:27AM 20 THE GOVERNMENT HAS EXCEEDED ITS OBLIGATIONS IN THIS CASE

11:27AM 21 BY PROVIDING A VERY THOROUGH WRITTEN DISCLOSURE TO THE DEFENSE.

11:27AM 22 ADDITIONAL FACTS ARE -- THE UNDERLYING INFORMATION, UNDERLYING

11:27AM 23 THAT LETTER AND THE INTERNAL GOVERNMENT COMMUNICATIONS

11:27AM 24 THEMSELVES CERTAINLY ARE NOT RELEVANT OR HELPFUL TO THE DEFENSE

11:27AM 25 UNLESS THE COURT FINDS THAT THERE ARE DISPUTED ISSUES HERE TO

11:27AM 1 BE DECIDED, AND THE GOVERNMENT SUBMITS THAT THERE ARE NOT.

11:27AM 2 THE UNDISPUTED FACTS HERE ARE SUFFICIENT TO ESTABLISH THAT

11:27AM 3 THE DEFENDANT'S CLAIM CANNOT PROCEED, THAT THE DEFENDANT'S

11:27AM 4 REQUEST FOR THE SUPPRESSION MUST FAIL, AND THAT THERE'S NO NEED

11:27AM 5 FOR AN EVIDENTIARY HEARING.

11:27AM 6 AND WITH THE COURT'S PERMISSION, I WOULD LIKE TO HIGHLIGHT

11:27AM 7 SOME OF THE CASE LAW THAT I THINK ESTABLISHES THAT.

11:27AM 8 THE COURT: SURE.

11:28AM 9 MR. BOSTIC: THE LOUD HAWK OPINION ITSELF SAYS THAT

11:28AM 10 SUPPRESSION IS APPROPRIATE UNDER SOME CIRCUMSTANCES WHEN THE

11:28AM 11 GOVERNMENT LOSES OR DESTROYS TANGIBLE EVIDENCE PRIOR TO TRIAL.

11:28AM 12 NOW, THAT'S IN THE COURT'S OPINION ITSELF, NOT IN

11:28AM 13 JUDGE KENNEDY'S CONCURRENCE, BUT IN THE COURT'S OPINION WHICH

11:28AM 14 IS NINTH CIRCUIT PRECEDENT.

11:28AM 15 IN THIS CASE, AS WE JUST DISCUSSED, THE EVIDENCE WAS

11:28AM 16 ACTUALLY MORE UNDER THE DEFENDANT'S CONTROL THAN THE

11:28AM 17 GOVERNMENT'S, AND I'M NOT RAISING THIS TO ASSIGN BLAME OR

11:28AM 18 INSINUATE WRONGDOING ON THE DEFENDANT'S PART.

11:28AM 19 THE POINT HERE IS ABOUT ACCESS AND PREJUDICE, AND IT'S

11:28AM 20 GOING TO BE IMPOSSIBLE FOR THE DEFENDANT TO SHOW THAT SHE WAS

11:28AM 21 PREJUDICED BY THE LOSS OF THIS INFORMATION WHEN DURING THE

11:28AM 22 RELEVANT TIME PERIOD THE INDIVIDUAL INVOLVED WHO ACTUALLY HAD

11:28AM 23 EASIER ACCESS TO IT THAN THE GOVERNMENT WAS DEFENDANT HERSELF.

11:28AM 24 SO WHEN THE GOVERNMENT'S INVESTIGATION BEGAN, WHEN THE

11:28AM 25 S.E.C. SERVED DOCUMENT PRESERVATION NOTICES ON THERANOS, WHEN

11:28AM 1 THE GOVERNMENT SERVED GRAND JURY SUBPOENAS ON THERANOS CALLING  
11:29AM 2 FOR PORTIONS OF THE LIS AND THEN THE ENTIRE THING, AT THOSE  
11:29AM 3 TIME PERIODS THIS WAS DEFENDANT'S COMPANY THAT SHE HAD FOUNDED  
11:29AM 4 OF WHICH SHE SERVED AS THE CHIEF EXECUTIVE OF WHICH SHE WAS A  
11:29AM 5 MAJOR SHAREHOLDER.

11:29AM 6 EVEN AFTER INDICTMENT WHEN THE LIS WAS PRODUCED TO THE  
11:29AM 7 DEFENDANT, DEFENDANT -- OR EXCUSE ME, PRODUCED TO THE  
11:29AM 8 GOVERNMENT, THE DEFENDANT REMAINS CHAIR OF THE BOARD OF THE  
11:29AM 9 COMPANY AND WAS STILL CONNECTED TO THE COMPANY.

11:29AM 10 IN CONTRAST, THE GOVERNMENT'S ACCESS TO THE EVIDENCE HERE  
11:29AM 11 WAS VIA GRAND JURY SUBPOENA WHERE THE GOVERNMENT WAS DEFENDED  
11:29AM 12 ON COMPLIANCE OF THE DOCUMENT CUSTODIAN, THERANOS ITSELF, AND  
11:29AM 13 THE GOVERNMENT UNDERSTOOD THAT IT WAS OBTAINING THAT COMPLIANCE  
11:29AM 14 DURING THE RELEVANT TIME PERIOD. ONLY LATER DID IT BECOME  
11:29AM 15 APPARENT THAT THE COPY THAT IT HAD OBTAINED FROM THERANOS WAS  
11:29AM 16 NOT Viable.

11:29AM 17 UNDER THE CASE LAW THESE DISTINCTIONS MATTER. THE  
11:29AM 18 DIFFERENCE BETWEEN CASES WHERE THE GOVERNMENT ACTUALLY  
11:30AM 19 POSSESSED THE EVIDENCE THAT WAS LOST AND CASES WHERE IT'S  
11:30AM 20 ALLEGED THAT THE GOVERNMENT FAILED TO COLLECT, THESE  
11:30AM 21 DISTINCTIONS MATTER AND THEY SERVE TO DEFEAT DEFENDANT'S  
11:30AM 22 REQUEST HERE.

11:30AM 23 IN FACT, IT'S CRITICAL THAT NO COURT CASE HAS EVEN APPLIED  
11:30AM 24 LOUD HAWK TO A SIMILAR SITUATION INVOLVING A FAILURE TO  
11:30AM 25 COLLECT, AT LEAST NO CASE CITED BY THE DEFENDANT AND NO CASE

11:30AM 1 THAT THE GOVERNMENT CAN LOCATE.

11:30AM 2 FLYER ITSELF DOES NOT ADDRESS WHETHER SANCTIONS LIKE

11:30AM 3 SUPPRESSION ARE APPROPRIATE WHEN LAW ENFORCEMENT FAILS TO

11:30AM 4 COLLECT EVIDENCE IN THE FIRST PLACE.

11:30AM 5 IN U.S. VERSUS BROWN, THAT'S A DISTRICT CASE CITED BY THE

11:30AM 6 GOVERNMENT IN ITS BRIEFS, THE COURT CITES FLYER BUT NOTES THE

11:30AM 7 LACK OF CASE LAW APPLYING THIS TEST IN SITUATIONS LIKE THIS AND

11:30AM 8 IN THE ABSENCE OF THAT SUPPORT DECLINES TO EVEN ENGAGE IN

11:30AM 9 LOUD HAWK BALANCING IN THE FIRST PLACE, AFTER, BY THE WAY,

11:30AM 10 FINDING THAT THE FAILURE TO COLLECT BODY WORN CAMERA FOOTAGE IN

11:31AM 11 THAT CASE WASN'T A DUE PROCESS VIOLATION BECAUSE THERE WAS NOT

11:31AM 12 BAD FAITH OR SHOWING OF EXONERATORY VALUE.

11:31AM 13 IT'S ALSO IMPORTANT THAT SOME OF THE CASES IN THIS AREA

11:31AM 14 ARE FOCUSING ON THE NEED OR THE APPLICABILITY OF A JURY

11:31AM 15 INSTRUCTION REGARDING MISSING EVIDENCE. SO ZUNIGA-GARCIA,

11:31AM 16 THAT'S A CASE RELIED UPON BY THE DEFENSE, INVOLVING A TOOL HELD

11:31AM 17 BY THE DEFENDANT AND A LARGER SET OF TOOLS USED FOR ALLEGEDLY

11:31AM 18 MODIFYING A GAS TANK TO SMUGGLE DRUGS, THAT CASE PROVIDED

11:31AM 19 LITTLE ANALYSIS OVERALL, BUT IT'S IMPORTANT TO NOTE THAT IN

11:31AM 20 THAT CASE THE EVIDENCE WAS LOST OR DESTROYED WHILE HELD BY THE

11:31AM 21 GOVERNMENT UNLIKE THE FACTS OF THIS CASE. AND THAT CASE

11:31AM 22 INVOLVED A REMEDIAL JURY INSTRUCTION.

11:31AM 23 AND FOR CASES DEALING WITH REMEDIAL JURY INSTRUCTIONS, I

11:31AM 24 THINK IT'S IMPORTANT TO NOTE THAT THE NINTH CIRCUIT MODEL

11:31AM 25 INSTRUCTION, THAT'S MODEL INSTRUCTION 4.19 WHERE THE NOTES OF

11:32AM 1 THAT INSTRUCTION CITE THE LOUD HAWK CASE, THAT INSTRUCTION SAYS  
11:32AM 2 IF YOU FIND THAT THE GOVERNMENT INTENTIONALLY DESTROYED OR  
11:32AM 3 FAILED TO PRESERVE, AND INSERT DESCRIPTION OF EVIDENCE, THAT  
11:32AM 4 THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN WOULD BE EVIDENCE IN  
11:32AM 5 THIS CASE, THEN THE JURY MAY INFER THAT THAT EVIDENCE WAS  
11:32AM 6 UNFAVORABLE TO THE GOVERNMENT.

11:32AM 7 SO AGAIN, THIS IS THE NINTH CIRCUIT'S MODEL INSTRUCTION  
11:32AM 8 ESSENTIALLY CODIFYING LOUD HAWK IN THE CONTEXT OF JURY  
11:32AM 9 INSTRUCTIONS, AND IT'S EXPRESSLY WORDED IN THE CONTEXT OF CASES  
11:32AM 10 WHERE THE GOVERNMENT INTENTIONALLY DESTROYING OR FAILING TO  
11:32AM 11 PRESERVE EVIDENCE THAT IT KNOWS WOULD BE EXONERATORY.

11:32AM 12 SO GIVEN THAT, AGAIN, AND THE LACK OF CASE LAW APPLYING  
11:32AM 13 LOUD HAWK, LACK OF CASE LAW APPLYING THAT BALANCING TEST,  
11:32AM 14 TWO CASES INVOLVING THE FAILURE TO COLLECT EVIDENCE, THERE ARE  
11:32AM 15 SERIOUS QUESTIONS ABOUT WHETHER THAT TEST EVEN APPLIES IN THIS  
11:32AM 16 SITUATION.

11:32AM 17 MARTINEZ VERSUS MARTINEZ, THAT'S A NINTH CIRCUIT CASE THAT  
11:33AM 18 SAYS THAT THE FAILURE TO COLLECT POTENTIALLY USEFUL EVIDENCE  
11:33AM 19 IS, QUOTE, "DISTINCTLY DIFFERENT" THAN A DESTRUCTION OF  
11:33AM 20 EVIDENCE THAT IS ALREADY EXTANT.

11:33AM 21 SO, AGAIN, THE DEFENSE'S FAILURE TO CITE A CASE LIKE THIS  
11:33AM 22 ONE WHERE THE COURT IMPOSED SANCTIONS WHERE THE GOVERNMENT DID  
11:33AM 23 NOT DESTROY OR LOSE EVIDENCE I THINK IT REALLY MATTERS AND  
11:33AM 24 WEAKENS THEIR CLAIM.

11:33AM 25 AND ALL THE MORE SO, NOT ONLY IS THERE NOT A CASE IMPOSING

11:33AM 1 SANCTIONS UNDER THOSE CIRCUMSTANCES, THERE CERTAINLY ISN'T A  
11:33AM 2 CASE IMPOSING SANCTIONS WHERE THE GOVERNMENT ACTUALLY SOUGHT TO  
11:33AM 3 OBTAIN THE EVIDENCE IN QUESTION WHERE THE GOVERNMENT WAS LED TO  
11:33AM 4 BELIEVE THAT IT HAD OBTAINED THE EVIDENCE WHERE AT THE TIME THE  
11:33AM 5 EVIDENCE WAS LOST, IT WAS ACTUALLY CONTROLLED BY THE DEFENDANT  
11:33AM 6 OR PARTIES CONNECTED TO THE DEFENDANT RATHER THAN THE  
11:33AM 7 GOVERNMENT, AND WHERE THE EVIDENCE WAS DESTROYED NOT BY THE  
11:33AM 8 GOVERNMENT OR ITS AGENTS BUT BY INDIVIDUALS AFFILIATED WITH THE  
11:34AM 9 DEFENDANT, THOSE FACTS PRESENT HERE TAKE THIS CASE SO FAR OUT  
11:34AM 10 OF THE HEARTLAND OF AUTHORITY WHERE SANCTIONS LIKE THIS ARE  
11:34AM 11 EVEN CONSIDERED OR IMPOSED THAT DEFENDANT'S REQUEST REALLY  
11:34AM 12 REPRESENTS A SIGNIFICANT EXPANSION OF THE CASE LAW IN THIS  
11:34AM 13 AREA.  
11:34AM 14 AND GIVEN THE FACTS OF THIS CASE, THE GOVERNMENT WOULD  
11:34AM 15 SUBMIT THAT THE FACTS SIMPLY ARE NOT COMPELLING ENOUGH TO  
11:34AM 16 WARRANT THAT KIND OF EXPANSION EVEN IF ONE WERE SUPPORTED BY  
11:34AM 17 THE LAW.  
11:34AM 18 THE COURT: ALL RIGHT. THANK YOU, MR. BOSTIC.  
11:34AM 19 ANYTHING FURTHER?  
11:34AM 20 MR. BOSTIC: NO, YOUR HONOR.  
11:34AM 21 I HAVE ADDITIONAL THOUGHTS ON BAD FAITH AND THE  
11:34AM 22 EXONERATORY NATURE OF THE EVIDENCE, BUT IF THE COURT IS --  
11:34AM 23 FEELS THAT IT'S PREPARED ON THOSE ISSUES, THEN I'M HAPPY TO  
11:34AM 24 SUBMIT.  
11:34AM 25 THE COURT: WELL, WHY DON'T YOU STATE IT FOR THE

11:34AM 1 RECORD. WHY DON'T YOU -- I'LL LET YOU GO FORWARD AND TELL ME  
11:34AM 2 YOUR THOUGHTS ON THOSE TWO TOPICS IF YOU WISH.  
11:34AM 3 MR. BOSTIC: THANK YOU, YOUR HONOR. JUST VERY  
11:35AM 4 BRIEFLY.  
11:35AM 5 ON THE BAD FAITH ISSUE, AGAIN, THE LOUD HAWK OPINION OF  
11:35AM 6 THE COURT DOES SAY THAT SUPPRESSION OF SECONDARY EVIDENCE IS  
11:35AM 7 APPROPRIATE WHERE A DEFENDANT CAN SHOW BAD FAITH OR CONNIVANCE  
11:35AM 8 ON THE PART OF THE GOVERNMENT.  
11:35AM 9 THE CONCURRENCE BY JUDGE KENNEDY CONTAINS DICTA SAYING  
11:35AM 10 THAT IN CASES OF SEVERE PREJUDICE, QUOTE, "SEVERE PREJUDICE,"  
11:35AM 11 SUPPRESSION OR OTHER SANCTIONS CAN BE APPROPRIATE WITHOUT  
11:35AM 12 REGARD TO GOOD FAITH OR CULPABILITY OF THE GOVERNMENT.  
11:35AM 13 TWO POINTS ON THAT. FIRST, THIS IS NOT A CASE INVOLVING  
11:35AM 14 SEVERE PREJUDICE. I'LL TALK ABOUT THAT BRIEFLY IN A MINUTE.  
11:35AM 15 BUT MORE GENERALLY, WE SEE FROM THIS THAT THE DEFENSE'S  
11:35AM 16 ARGUMENT REALLY RELIES ON CHERRY PICKING PHRASES LIKE THIS FROM  
11:35AM 17 DICTA, BUT ALSO ASKING THE COURT TO IGNORE THE HOLDINGS OF  
11:35AM 18 THESE CASES. THE HOLDINGS OF THESE CASES GENERALLY AND  
11:35AM 19 CONSISTENTLY SHOW THAT THE BURDEN TO OBTAIN THIS KIND OF RELIEF  
11:36AM 20 IS VERY HIGH AND THAT THE FOCUS OF THE COURT'S ANALYSIS IN  
11:36AM 21 CASES LIKE THIS IS REALLY ON THE CULPABILITY AND THE BAD FAITH  
11:36AM 22 OF GOVERNMENT ACTORS.  
11:36AM 23 THE FLYER ITSELF, THE FLYER OPINION AFFIRMS THE DISTRICT  
11:36AM 24 COURT'S FINDINGS REGARDING DUE PROCESS AND SUPPRESSION, SO  
11:36AM 25 AFFIRMING THE DISTRICT COURT'S DECISION NOT TO FIND A DUE

11:36AM 1 PROCESS VIOLATION OR TO SUPPRESS EVIDENCE. AND IN FLYER THE  
11:36AM 2 NINTH CIRCUIT NOTES IN BOTH OF THOSE CONTEXTS THE DISTRICT  
11:36AM 3 COURT'S FINDING IS NO BAD FAITH BY THE GOVERNMENT. THAT'S A  
11:36AM 4 CASE WHERE THE HARD DRIVE WAS MISHANDLED, BUT THE GOVERNMENT  
11:36AM 5 DIDN'T INTENTIONALLY CORRUPT DATA.

11:36AM 6 SO, AGAIN, IN THAT CASE ALTHOUGH BAD FAITH MAY NOT BE AN  
11:36AM 7 EXPLICIT REQUIREMENT, FLYER MAKES CLEAR THAT THE PRESENCE OR  
11:36AM 8 ABSENCE OF BAD FAITH IS A CRITICAL DETERMINATION NOT JUST TO  
11:36AM 9 THE DUE PROCESS QUESTION BUT ALSO TO THE QUESTION OF WHETHER  
11:36AM 10 SANCTIONS ARE APPROPRIATE.

11:36AM 11 OTHER CASES ARE SIMILAR. U.S. VERSUS HENDRIX CITED BY THE  
11:37AM 12 GOVERNMENT AND ALSO U.S. VERSUS ROBERTSON FOCUSED ON THE  
11:37AM 13 GOVERNMENT'S CONDUCT AND THE CULPABILITY OR LACK THEREOF OF THE  
11:37AM 14 GOVERNMENT'S CONDUCT.

11:37AM 15 JUST VERY BRIEFLY HERE ON THE EXONERATORY NATURE OR THE  
11:37AM 16 ALLEGED EXONERATORY NATURE OF THE DATA IN THE LIS. DEFENSE  
11:37AM 17 COUNSEL SAID MULTIPLE TIMES THAT THIS WAS THE MOST CRITICAL  
11:37AM 18 EVIDENCE IN THE CASE. THE GOVERNMENT ABSOLUTELY DISAGREES WITH  
11:37AM 19 THAT, AND THAT'S NOT SUPPORTED BY THE EVIDENCE.

11:37AM 20 CERTAINLY THE GOVERNMENT DID NOT VIEW THIS AS THE MOST  
11:37AM 21 CRITICAL EVIDENCE IN THE CASE AT THE TIME OF INDICTMENT. IF  
11:37AM 22 THAT HAD BEEN THE CASE, OF COURSE THE GOVERNMENT WOULD HAVE  
11:37AM 23 COLLECTED AND EXAMINED THAT EVIDENCE PRIOR TO CHARGING THE  
11:37AM 24 CASE.

11:37AM 25 THIS CASE WAS CHARGED BASED ON THE OTHER EVIDENCE THAT

11:37AM 1 CONCLUSIVELY SHOWS THAT THERANOS'S TECHNOLOGY SUFFERED FROM  
11:37AM 2 ACCURACY AND RELIABILITY PROBLEMS AS WELL AS THE WEALTH OF  
11:37AM 3 EVIDENCE THAT ESTABLISHES THE INVESTOR FRAUD AS TO WHICH THE  
11:37AM 4 LIS IS OF MINIMAL RELEVANCE.

11:37AM 5 SO I JUST WANT TO PUSH BACK ON THE DEFENSE'S  
11:38AM 6 CHARACTERIZATION OF THIS AS THE UNDISPUTED MOST CRITICAL  
11:38AM 7 EVIDENCE IN THE CASE. THAT'S SIMPLY NOT TRUE, AND THAT'S  
11:38AM 8 PARTLY BECAUSE OF THE LIMITATIONS OF THE LIS AND WHAT IT COULD  
11:38AM 9 NOT DO.

11:38AM 10 I BELIEVE THE DEFENSE CONCEDES THAT THE LIS WOULD NOT  
11:38AM 11 ALLOW EITHER PARTY TO IDENTIFY ACCURATE OR INACCURATE RESULTS  
11:38AM 12 SIMPLY BY LOOKING AT THOSE RESULTS. IT'S NOT THE CASE THAT WE  
11:38AM 13 COULD OPEN IT UP AND SEE MILLIONS OF ENTRIES, ACCURATE ONES  
11:38AM 14 HIGHLIGHTED IN GREEN AND INACCURATE ONES HIGHLIGHTED IN RED.

11:38AM 15 THE COURT HAS SEEN, I THINK, THAT THE WAY THAT WE SHOW AN  
11:38AM 16 INDIVIDUAL RESULT IS INACCURATE IS BY COMPARING IT AGAINST  
11:38AM 17 EITHER A REFERENCE TEST AT THE SAME TIME THAT INFORMATION WOULD  
11:38AM 18 NOT HAVE BEEN INCLUDED IN THE LIS OR BY COMPARING A PATIENT'S  
11:38AM 19 RESULT TO THE OTHER INFORMATION WE HAVE ABOUT THAT PATIENT'S  
11:38AM 20 PRESENTATION. FOR EXAMPLE, IF SOMEONE TESTS NEGATIVE FOR  
11:38AM 21 PREGNANCY BUT THEN ENDS UP CARRYING A FETUS TO TERM, WE HAVE A  
11:39AM 22 CONFLICT THERE BETWEEN THE BLOOD TESTS RESULTS AND THE REALITY  
11:39AM 23 OF THE PATIENT'S CONDITION. THAT KIND OF INFORMATION, THE  
11:39AM 24 INFORMATION CONTAINED IN A PATIENT'S MEDICAL CHART, THE  
11:39AM 25 INFORMATION THAT A DOCTOR CAN OBTAIN BY OBSERVING A PATIENT,

11:39AM 1 THAT INFORMATION IS NOT CONTAINED IN THE LIS, EITHER.

11:39AM 2 SO THE IDEA THAT THE LIS WOULD HAVE ENABLED THE PARTIES TO

11:39AM 3 DETERMINE AN OVERALL FAILURE RATE OR REACH A CONCLUSIVE

11:39AM 4 DETERMINATION ABOUT THERANOS'S OVERALL RELIABILITY IS SIMPLY

11:39AM 5 FALSE.

11:39AM 6 TO THE EXTENT THAT THE LIS WOULD HAVE BEEN USEFUL IN THIS

11:39AM 7 CASE, IT WOULD HAVE BEEN USEFUL CERTAINLY TO THE GOVERNMENT IN

11:39AM 8 CORROBORATING THE INFORMATION THAT THE GOVERNMENT INTENDS TO

11:39AM 9 PRESENT FROM WITNESSES, INCLUDING INDIVIDUAL PATIENTS AND

11:39AM 10 FORMER THERANOS EMPLOYEES WHO DID HAVE ACCESS TO THAT DATA, AND

11:39AM 11 IT'S FROM THOSE EMPLOYEES THAT WE KNOW THAT THE LIS DATA WOULD

11:40AM 12 NOT HAVE BEEN EXONERATORY IN THIS CASE.

11:40AM 13 THE INDIVIDUALS AT THERANOS WHO WORKED WITH THAT DATA, THE

11:40AM 14 GOVERNMENT REGULATORS WHO HAD ACCESS TO SOME OF THAT DATA

11:40AM 15 CONCLUDED THAT THE DATA SHOWED SERIOUS AND GLOBAL PROBLEMS WITH

11:40AM 16 THERANOS'S ACCURACY AND RELIABILITY. THAT'S HOW WE KNOW THAT

11:40AM 17 WERE THIS EVIDENCE STILL AVAILABLE, WERE THE LIS STILL INTACT,

11:40AM 18 IT ACTUALLY WOULD HAVE BEEN INculPATORY RATHER THAN

11:40AM 19 EXONERATORY.

11:40AM 20 THE DEFENSE'S SPECULATION OR ASSUMPTIONS ABOUT WHAT MIGHT

11:40AM 21 HAVE BEEN POSSIBLE WERE THE DEFENSE TEAM ABLE TO ANALYZE THE

11:40AM 22 LIS DATA JUST CAN'T SUPPORT THE REQUEST UNDER THE CASE LAW.

11:40AM 23 WITH THAT THE GOVERNMENT WILL SUBMIT, YOUR HONOR.

11:40AM 24 THE COURT: ALL RIGHT. THANK YOU.

11:40AM 25 MS. SAHARIA?

11:40AM 1 MS. SAHARIA: YES. THANK YOU, YOUR HONOR.

11:40AM 2 LET ME COVER A FEW POINTS. FIRST, LET ME JUST RESPOND

11:40AM 3 BRIEFLY TO MR. BOSTIC'S DISCUSSION OF THE CASE LAW JUST TO GET

11:41AM 4 THAT OUT OF THE WAY.

11:41AM 5 I DON'T OFTEN DO THIS, ACCUSE OPPOSING COUNSEL OF

11:41AM 6 MISCHARACTERIZING THE CASE LAW, BUT MR. BOSTIC IS

11:41AM 7 MISCHARACTERIZING LOUD HAWK. I DON'T THINK HE'S DOING SO

11:41AM 8 INTENTIONALLY.

11:41AM 9 THE DISCUSSION OF REQUIRING BAD FAITH IS NOT THE OPINION

11:41AM 10 OF THE COURT, AND THAT'S CLEAR FROM THE OPENING, THE OPENING

11:41AM 11 DISCUSSION IN LOUD HAWK WHERE IT IDENTIFIED JUDGES WHO JOIN THE

11:41AM 12 OPINION. I'M JUST GOING TO READ IT TO THE COURT. "TRASK,

11:41AM 13 CIRCUIT JUDGE, FILES AN OPINION AND THE JUDGMENT OF THE COURT.

11:41AM 14 BROWNING, WRIGHT, CHOY, WALLACE,, ANDERSON, AND KENNEDY CONCUR

11:41AM 15 IN THE RESULT AND IN SECTIONS I, II, III, AND VI."

11:41AM 16 THE PART OF THE OPINION THAT MR. BOSTIC IS QUOTING TO THE

11:41AM 17 COURT IS SECTION IV OF THAT OPINION. IT IS NOT THE OPINION OF

11:41AM 18 THE COURT.

11:41AM 19 WE DIDN'T CITE THIS CASE TO THE COURT BECAUSE I THOUGHT

11:42AM 20 THAT IT WAS CRYSTAL CLEAR THAT JUDGE KENNEDY'S OPINION IS NOT

11:42AM 21 DICTA BUT IS CONTROLLING LAW IN THE NINTH CIRCUIT, BUT SINCE

11:42AM 22 THE GOVERNMENT APPARENTLY DISAGREES, I WOULD CITE THE COURT TO

11:42AM 23 THE UNITED STATES VERSUS SIVILLA, 714 F. 3D 1168, NINTH CIRCUIT

11:42AM 24 2013 IN WHICH THE NINTH CIRCUIT SAYS THAT JUDGE KENNEDY'S

11:42AM 25 CONCURRING OPINION IN LOUD HAWK IS CONTROLLING LAW OF THIS

11:42AM 1 CIRCUIT TO DETERMINE WHETHER GOVERNMENT LOSS OF EVIDENCE  
11:42AM 2 WARRANTS SANCTIONS LESS THAN DISMISSAL.  
11:42AM 3 IT'S NOT DICTA. THAT IS THE CONTROLLING LAW IN THIS  
11:42AM 4 CIRCUIT, AND JUDGE TRASK'S DISCUSSION OF BAD FAITH IS NOT EVEN  
11:42AM 5 THE OPINION OF THE COURT IN LOUD HAWK. SO JUST TO GET THAT OUT  
11:42AM 6 OF THE WAY.  
11:42AM 7 A FEW OTHER ISSUES WITH RESPECT TO THE CASE LAW. THE  
11:42AM 8 GOVERNMENT RELIES VERY HEAVILY ON THE BROWN DISTRICT COURT CASE  
11:42AM 9 FROM ANOTHER DISTRICT WHERE THE COURT SAID THAT A FAILURE TO  
11:42AM 10 COLLECT EVIDENCE IS NOT ACTIONABLE UNDER LOUD HAWK, BUT THAT  
11:43AM 11 COURT FAILED TO ACKNOWLEDGE THE LANGUAGE IN LOUD HAWK THAT  
11:43AM 12 WHETHER THE EVIDENCE WAS IN THE GOVERNMENT'S CUSTODY IS JUST  
11:43AM 13 ONE RELEVANT FACTOR.  
11:43AM 14 LOUD HAWK DOES NOT MAKE THAT DISPOSITIVE. IT CLEARLY IS  
11:43AM 15 JUST ONE FACTOR OUT OF MANY, AND THAT DISTRICT COURT FAILS TO  
11:43AM 16 RECOGNIZE THAT LANGUAGE IN LOUD HAWK.  
11:43AM 17 THAT CASE ALSO, BY THE WAY, DOESN'T EVEN REALLY INVOLVE  
11:43AM 18 THE FAILURE TO COLLECT THE EVIDENCE SO MUCH AS A FAILURE TO  
11:43AM 19 CREATE THE EVIDENCE. IT INVOLVES A SITUATION WHERE THE POLICE  
11:43AM 20 OFFICERS WERE NOT WEARING THEIR BODY CAMS, AND THERE WAS NO  
11:43AM 21 EVIDENCE TO EVEN BE COLLECTED. THERE WAS NO VIDEO. THE CLAIM  
11:43AM 22 WAS JUST THAT THE POLICE OFFICERS HAD VIOLATED PROTOCOL BY  
11:43AM 23 FAILING TO TURN ON THEIR VIDEO CAMS.  
11:43AM 24 THE ZUNIGA-GARCIA CASE IS A LOUD HAWK CASE. IT'S CRYSTAL  
11:43AM 25 CLEAR FROM THAT CASE THAT INTENT IS NOT REQUIRED UNDER

11:43AM 1       LOUD HAWK. AND, AGAIN, THE COURT OR THE GOVERNMENT CITED THE  
11:43AM 2       MARTINEZ CASE FROM THE NINTH CIRCUIT. THAT IS NOT A LOUD HAWK  
11:44AM 3       CASE, EITHER, AND THE CONTROLLING NINTH CIRCUIT CASE LAW UNDER  
11:44AM 4       THE DUE PROCESS CLAIM AND WHETHER A FAILURE TO COLLECT CAN RISE  
11:44AM 5       TO THE LEVEL OF A DUE PROCESS VIOLATION IS MILLER VERSUS  
11:44AM 6       VASQUEZ, AND IT CLEARLY HOLDS THAT IT CAN.

11:44AM 7                   SO THAT'S JUST TO RESPOND TO SOME OF THE CASE LAW.

11:44AM 8                   NOW, WITH RESPECT TO THE EVIDENCE, MR. BOSTIC GAVE A VERY  
11:44AM 9                   NICE CLOSING ARGUMENT ABOUT WHAT FINDINGS OF FACT HE WOULD LIKE  
11:44AM 10                  THE COURT TO REACH AT THE CONCLUSION OF AN EVIDENTIARY HEARING,  
11:44AM 11                  BUT THAT'S WHY WE WOULD NEED A HEARING SO THE COURT CAN JUDGE  
11:44AM 12                  CREDIBILITY FOR ITSELF.

11:44AM 13                  I THINK MR. BOSTIC URGED THE COURT TO REACH CREDIBILITY  
11:44AM 14                  DETERMINATIONS BASED ON 302 MEMOS FROM THE FBI. THAT'S CLEARLY  
11:44AM 15                  NOT APPROPRIATE. THE COURT NEEDS TO HEAR THE EVIDENCE LIVE AND  
11:44AM 16                  DETERMINE WHETHER THOSE WITNESSES ARE CREDIBLE, HEAR THEIR  
11:44AM 17                  TESTIMONY FIRSTHAND AND DETERMINE WHETHER MR. BOSTIC'S  
11:45AM 18                  REPRESENTATIONS THAT THESE ARE DEAD ENDS ARE REALLY ACCURATE.  
11:45AM 19                  WE JUST DON'T KNOW BECAUSE WE DON'T HAVE ALL OF THE EVIDENCE  
11:45AM 20                  BEFORE US.

11:45AM 21                  THE COURT: WELL, MS. SAHARIA, LET ME ASK YOU, WHAT  
11:45AM 22                  -- IT SEEMS CLEAR THAT THERE'S NO DISPUTE THAT WHAT THE  
11:45AM 23                  GOVERNMENT HAS, WHAT THE GOVERNMENT WAS PROVIDED IS  
11:45AM 24                  INACCESSIBLE, AND IT WAS AT THE TIME THAT THEY RECEIVED IT  
11:45AM 25                  BECAUSE THEY DO NOT HAVE THE KEY. THE DOCUMENTS THAT YOU

11:45AM 1 SUPPLIED TO THE COURT, EXHIBITS AND THINGS, SHOW  
11:45AM 2 CONTEMPORANEOUS EMAILS FROM WILMER AND OTHER PARTIES WHO WERE  
11:45AM 3 IN CONTROL AT THE TIME, AT LEAST RECOGNITION THAT A KEY WAS  
11:45AM 4 MISSING. THERE'S MENTION OF NAMES OF INDIVIDUALS WHO CREATED  
11:45AM 5 THE LIS, INDIVIDUALS WHO MIGHT HAVE THE KEY, INDIVIDUALS WHO  
11:45AM 6 WERE IN INDIA. I THINK I REFERENCED THOSE EARLIER.  
11:45AM 7 BUT THERE'S NO DISPUTE, IS THERE, THAT THE GOVERNMENT HAD,  
11:46AM 8 WHEN THEY RECEIVED THE LIS ON AUGUST 27, AND WHENEVER IT WAS,  
11:46AM 9 2018, IT WAS A NONFUNCTIONING COPY? IT WAS SOMETHING THAT WAS  
11:46AM 10 GIVEN TO THEM THAT THEY EITHER RECEIVED IN GOOD FAITH OR  
11:46AM 11 WHATEVER, BUT WHATEVER THEY RECEIVED IT WAS -- THEY COULD NOT  
11:46AM 12 ACCESS IT, AND THEY DID NOT KNOW THAT AT THE TIME.  
11:46AM 13 IS THAT IN DISPUTE?  
11:46AM 14 MS. SAHARIA: I DON'T DISPUTE THAT.  
11:46AM 15 BUT WHAT I DO DISPUTE IS WHETHER -- HAD THE GOVERNMENT  
11:46AM 16 ACTED PROMPTLY AND REASONABLY AS REASONABLE PROSECUTORS WOULD  
11:46AM 17 HAVE DONE, WOULD THEY HAVE BEEN ABLE TO FIND THE INFORMATION  
11:46AM 18 THEY NEEDED TO USE THE DATABASE COPY THAT THEY HAD?  
11:46AM 19 NOW, IN MY OPENING PRESENTATION I NOTED FOR THE COURT THAT  
11:46AM 20 IF YOU READ THE BRADY LETTER VERY CAREFULLY, IT APPEARS THAT  
11:46AM 21 THE FIRST TIME THAT THE GOVERNMENT ASKED ANYONE FOR A PASSWORD  
11:47AM 22 WAS A YEAR AND A HALF LATER, AND MR. BOSTIC DID NOT CHALLENGE  
11:47AM 23 THAT IN HIS PRESENTATION. HE NOTES THAT THERE WERE DISCUSSIONS  
11:47AM 24 ABOUT HOW THEY COULDN'T ACCESS THE LIS DATABASE OCCURRING IN  
11:47AM 25 THE U.S. ATTORNEY'S OFFICE IN LATE 2018, AND THAT APPEARS TO BE

11:47AM 1 TRUE.

11:47AM 2 BUT AT THE TIME, IT APPEARS FROM THE BRADY LETTER, AND

11:47AM 3 AGAIN, I URGE THE COURT TO READ THOSE PARAGRAPHS VERY

11:47AM 4 CAREFULLY, THE PARALEGALS AND SUPPORT STAFF WERE TELLING THE

11:47AM 5 GOVERNMENT THAT THE DATABASE WAS TOO BIG AND THEY DIDN'T HAVE

11:47AM 6 THE RIGHT SOFTWARE TO ACCESS IT.

11:47AM 7 NOW, MIND YOU, THE GOVERNMENT HAD BEEN TOLD LONG AGO WHAT

11:47AM 8 SOFTWARE IT WOULD NEED TO ACCESS IT AND APPARENTLY IT DIDN'T

11:47AM 9 GET IT, BUT THAT'S WHAT THEY WERE TALKING ABOUT IN LATE 2018.

11:47AM 10 THERE'S NO DISCUSSION IN THE BRADY LETTER THAT THE

11:47AM 11 GOVERNMENT REALIZED IT NEEDED A PASSWORD, WHICH IT WOULD HAVE

11:47AM 12 DONE IF IT DILIGENTLY OPENED THE LIS DATABASE, AND WE CAN'T

11:47AM 13 KNOW UNTIL WE HAVE AN EVIDENTIARY HEARING WHETHER THEY COULD

11:48AM 14 HAVE OBTAINED THAT PASSWORD OR WHETHER THEY COULD HAVE RESTORED

11:48AM 15 THE PHYSICAL LIS DATABASE, AS WITNESSES HAVE SAID THEY COULD

11:48AM 16 HAVE, IF THEY HAD OBTAINED THE PHYSICAL HARDWARE FROM THE

11:48AM 17 ASSIGNEE. IT EXISTED.

11:48AM 18 IF THEY HAD ACTED PROMPTLY, THAT EQUIPMENT STILL EXISTED,

11:48AM 19 IT WAS WITH THE ASSIGNEE, THEY COULD HAVE COLLECTED IT. AND,

11:48AM 20 YOU KNOW, MR. BOSTIC POINTED OUT THAT COLLECTING PHYSICAL

11:48AM 21 ANALYZERS IS DIFFERENT THAN COLLECTING ESI AND THE TYPICAL

11:48AM 22 APPROACH TO COLLECTING ESI IS JUST TO, YOU KNOW, COLLECT A COPY

11:48AM 23 OF THE DATA.

11:48AM 24 THAT MIGHT BE SO IN THE ORDINARY CASE, BUT WE KNOW THIS IS

11:48AM 25 NOT AN ORDINARY CASE BECAUSE THE GOVERNMENT'S OWN EXPERTS,

11:48AM 1 THEIR OWN ESI EXPERTS RECOMMENDED TO THE GOVERNMENT THAT THEY  
11:48AM 2 TAKE STEPS TO EITHER GIVE IT TO THE FBI TO OPEN OR TO GO GET  
11:48AM 3 THE PHYSICAL EQUIPMENT. THEIR OWN EXPERTS TOLD THEM TO GO GET  
11:48AM 4 THE PHYSICAL EQUIPMENT AND THEY DIDN'T DO IT.

11:48AM 5 THE COURT: OKAY. SO WOULD IT -- AS TO THE  
11:49AM 6 DILIGENCE, AND I UNDERSTAND YOUR POINT ABOUT BEING CRITICAL OF  
11:49AM 7 THE GOVERNMENT WAITING FOR A YEAR, 18 MONTHS, WHATEVER IT WAS  
11:49AM 8 THAT THEY WAITED FOR. SO WOULD THEY HAVE BEEN DILIGENT IF THEY  
11:49AM 9 TRIED TO OPEN IT IN FIVE DAYS AT THE TIME THAT THEY RECEIVED  
11:49AM 10 IT? WOULD THAT HAVE BEEN DUE DILIGENCE?

11:49AM 11 MS. SAHARIA: WELL, PERHAPS, YOUR HONOR. I MEAN, I  
11:49AM 12 WOULD HOPE THAT THEY WOULD TRY TO OPEN IT WITHIN A DAY OR TWO  
11:49AM 13 OF RECEIVING IT. THAT'S WHAT I THINK MOST PEOPLE DO WHEN THEY  
11:49AM 14 RECEIVE PRODUCTION. THEY DON'T SIT AROUND FOR FIVE DAYS,  
11:49AM 15 ESPECIALLY WHEN THEY KNOW THAT THE PRODUCING COMPANY IS ABOUT  
11:49AM 16 TO DISSOLVE. I MEAN, I THINK THAT DISTINGUISHES THIS CASE FROM  
11:49AM 17 THE ORDINARY CASE.

11:49AM 18 THE COURT: BUT THEY DIDN'T KNOW. THEY DIDN'T KNOW  
11:49AM 19 THAT THE DATABASE WOULD BE DECOMMISSIONED FOUR DAYS AFTER THEY  
11:49AM 20 RECEIVED IT, THOUGH, DID THEY? IS THERE ANY DISPUTE ABOUT  
11:49AM 21 THAT?

11:49AM 22 MS. SAHARIA: MR. BOSTIC HAS REPRESENTED ORALLY TO  
11:49AM 23 THE COURT THAT FACT, AND I HAVE NO BASIS TO QUARREL WITH THAT  
11:50AM 24 ORAL REPRESENTATION TO THE COURT THAT HE DIDN'T KNOW THAT AT  
11:50AM 25 THE TIME.

11:50AM 1 THEY CERTAINLY KNEW THE COMPANY WAS CLOSING.

11:50AM 2 THE COURT: SURE. I DIDN'T SEE ANY DOCUMENTATION,

11:50AM 3 ANY EMAILS OR ANYTHING THAT PUT ANY PARTY ON NOTICE THAT THE

11:50AM 4 DATABASE WOULD BE DECOMMISSIONED WHEN IT WAS. I DIDN'T SEE

11:50AM 5 ANYTHING ABOUT THAT, NOR DID I SEE ANYTHING THAT GAVE

11:50AM 6 INFORMATION TO THE GOVERNMENT THAT WHAT THEY WERE GIVEN THEY

11:50AM 7 COULDN'T OPEN BECAUSE OF A LACK OF THIS KEY, I THINK THIS

11:50AM 8 PASSWORD KEY, THIS SECONDARY KEY THAT WAS NEEDED.

11:50AM 9 SO THEY WERE GIVEN SOMETHING AND IN ESSENCE FOUR DAYS

11:50AM 10 LATER IT -- THE LIS WAS -- THE ORIGINAL LIS WAS DESTROYED, AND

11:50AM 11 THE CRITICISM IS THE GOVERNMENT SHOULD HAVE OPENED THIS TO FIND

11:50AM 12 OUT THAT THEY HAD AN INOPERATIVE, INACCESSIBLE DATABASE PRIOR

11:51AM 13 TO THE DESTRUCTION OF THE LIS.

11:51AM 14 MS. SAHARIA: WELL, NO. AGAIN, THAT'S NOT PRECISELY

11:51AM 15 OUR -- MY POSITION.

11:51AM 16 IF THEY HAD ACTED PROMPTLY, WHETHER WITHIN FOUR DAYS OR

11:51AM 17 WHETHER WITHIN A WEEK, THERE WERE AVENUES AVAILABLE TO THE

11:51AM 18 GOVERNMENT TO USE THE COPY -- POTENTIALLY TO USE THE COPY IN

11:51AM 19 ITS POSSESSION OR TO GET THE ORIGINAL SERVER.

11:51AM 20 AND UNTIL WE HAVE AN EVIDENTIARY HEARING AND HEAR FROM THE

11:51AM 21 PEOPLE ON THE GROUND ABOUT WHAT THOSE AVENUES WOULD HAVE LED

11:51AM 22 TO, I DON'T THINK THAT WE CAN JUST TAKE FOR GRANTED THAT THESE

11:51AM 23 WERE DEAD ENDS AS MR. BOSTIC REPRESENTED THEM TO BE.

11:51AM 24 AGAIN, THEY COULD HAVE CONSULTED WITH THERANOS'S COUNSEL

11:51AM 25 ABOUT THE PASSWORD. APPARENTLY THEY DIDN'T DO THAT FOR A YEAR

11:51AM 1 AND A HALF, AND PERHAPS AT THAT POINT IN TIME THEY COULD HAVE  
11:51AM 2 FOUND THE PASSWORD. PERHAPS THEY COULD -- I MEAN, THEY  
11:51AM 3 CERTAINLY COULD HAVE OBTAINED THE PHYSICAL EQUIPMENT.

11:52AM 4 I THINK IT'S IMPORTANT TO KEEP IN MIND IN ADDITION THAT  
11:52AM 5 THE ONLY REASON THAT WE'RE IN THIS POSITION AT ALL, THAT WE'RE  
11:52AM 6 IN THIS POSITION OF THE FOUR-DAY GAP IS THAT THE GOVERNMENT  
11:52AM 7 WAITED A YEAR AND A HALF FROM LEARNING ABOUT THE LIS DATABASE  
11:52AM 8 TO EVEN BOTHER SUBPOENAING IT.

11:52AM 9 BY THE TIME THEY ASKED FOR THE DATABASE IN IT'S JUNE 4TH  
11:52AM 10 SUBPOENA, THEY KNEW THE COMPANY WAS CLOSING SOON. AND IF THEY  
11:52AM 11 HAD ACTED PROMPTLY IN OBTAINING OR COLLECTING EVIDENCE IN THE  
11:52AM 12 FIRST PLACE, WE VERY WELL WOULD HAVE NEVER BEEN IN THIS  
11:52AM 13 SITUATION.

11:52AM 14 THE COURT: BUT THERE WERE EARLIER SUBPOENAS AS  
11:52AM 15 MR. BOSTIC IDENTIFIED. THERE WERE EARLIER SUBPOENAS. AND THE  
11:52AM 16 SUBPOENAS IN THE REQUEST FOR PRODUCTION INDICATED DATABASE AND  
11:52AM 17 ALL SOFTWARE NECESSARY TO ACCESS TO THAT. I READ THOSE IN THE  
11:52AM 18 SUBPOENAS AS WELL AS --

11:52AM 19 MS. SAHARIA: THAT I DO NOT BELIEVE IS CORRECT,  
11:52AM 20 YOUR HONOR. THE FIRST SUBPOENA FOR THE DATABASE AND THE  
11:52AM 21 SOFTWARE NECESSARY TO OPERATE IT WAS JUNE 4TH. THEY HAD NEVER  
11:53AM 22 BEFORE THAT DATE REQUESTED PRODUCTION OF THE DATABASE.

11:53AM 23 THEY HAD REQUESTED PRODUCTION OF INFORMATION FROM THE  
11:53AM 24 DATABASE. THERANOS WOULD GENERATE EXCEL SPREADSHEETS OF  
11:53AM 25 CERTAIN DATA IN THE DATABASE AND PRODUCE THAT TO THE GOVERNMENT

11:53AM 1 AS EXCEL SPREADSHEETS. BUT THE FIRST REQUEST FOR THE DATABASE  
11:53AM 2 DIDN'T COME UNTIL JUNE 4TH, 2018.

11:53AM 3 WILMER HALE DID TELL THE GOVERNMENT WHAT SOFTWARE IT WOULD  
11:53AM 4 NEED. THAT SOFTWARE BELONGED TO MICROSOFT, AND THERANOS DIDN'T  
11:53AM 5 FEEL IT APPROPRIATE APPARENTLY, WHICH MAKES SENSE TO ME, TO  
11:53AM 6 GIVE THE GOVERNMENT, IT WOULD PROBABLY BREACH A LICENSE,  
11:53AM 7 TO GIVE THE GOVERNMENT A COPY OF THE PUBLICLY AVAILABLE  
11:53AM 8 MICROSOFT SOFTWARE. AND SO IT TOLD THE GOVERNMENT WHAT  
11:53AM 9 SOFTWARE TO GET, AND THERE'S NO EVIDENCE THAT IT DID.

11:53AM 10 JUST A FEW OTHER POINTS. ON THE BRADY ISSUE, THE  
11:53AM 11 INFORMATION IN THE BRADY LETTER, AND THIS GOES TO OUR MOTION TO  
11:54AM 12 COMPEL, IT IS BRADY INFORMATION. WHETHER OR NOT THE COURT  
11:54AM 13 ULTIMATELY CONCLUDES THAT THE GOVERNMENT IS AT FAULT AND THAT  
11:54AM 14 SUPPRESSION OR SOME OTHER SANCTION WOULD BE AN APPROPRIATE  
11:54AM 15 REMEDY, THE FACT THAT THE GOVERNMENT RECEIVED THE MOST  
11:54AM 16 COMPREHENSIVE COLLECTION OF TEST RESULT DATA AND MADE ALMOST NO  
11:54AM 17 ATTEMPT TO EVEN OPEN IT FOR A YEAR AND A HALF IS HIGHLY  
11:54AM 18 EXONERATOR AND PROBATIVE EVIDENCE THAT THE GOVERNMENT DIDN'T  
11:54AM 19 VIEW THIS AS VERY INEXONERATOR OTHERWISE YOU WOULD THINK IT  
11:54AM 20 WOULD TRY A LITTLE HARDER TO USE THIS DATA. THAT IS RELEVANT  
11:54AM 21 EVIDENCE.

11:54AM 22 WE ARE ENTITLED TO MAKE A JUDGMENT CALL AS TO WHETHER WE  
11:54AM 23 WANT TO PRESENT THAT EVIDENCE AT TRIAL, AND WE CAN'T DO THAT  
11:54AM 24 WITHOUT THE ACTUAL DOCUMENTS AND IDENTITIES OF THE INVOLVED  
11:54AM 25 INDIVIDUALS. SO THAT JUST GOES TO THE MOTION TO COMPEL.

11:54AM 1 JUST A FEW OTHER RESPONSES.

11:55AM 2 MR. BOSTIC POINTED OUT THAT THERE'S NO PREJUDICE HERE

11:55AM 3 BECAUSE TWO YEARS LATER IN 2020 THE GOVERNMENT PRODUCED A COPY

11:55AM 4 OF THE COPY TO MS. HOLMES.

11:55AM 5 OF COURSE MS. HOLMES DOES NOT HAVE ACCESS TO FBI COMPUTER

11:55AM 6 EXPERTS. SHE DOESN'T HAVE ACCESS TO THE PHYSICAL SERVERS

11:55AM 7 BECAUSE THE GOVERNMENT DIDN'T COLLECT THEM AND BY NOW THEY'VE

11:55AM 8 BEEN RETURNED TO THE LESSORS OR DESTROYED, NOR DID SHE HAVE

11:55AM 9 TIMELY ACCESS TO -- IN THE WAKE OF THIS PRODUCTION TO PEOPLE

11:55AM 10 WHO MIGHT HAVE HAD THE PASSWORD. AGAIN, THERE'S NO EVIDENCE

11:55AM 11 THAT MS. HOLMES HAD ANY KNOWLEDGE OF ANY OF THESE EVENTS, HAD

11:55AM 12 ANY KNOWLEDGE OF ANY PASSWORD ISSUE.

11:55AM 13 THE GOVERNMENT HAS AGAIN MADE SPECIOUS ASSERTIONS THAT SHE

11:55AM 14 MUST HAVE BEEN RESPONSIBLE FOR SUBPOENA COMPLIANCE. SHE WAS

11:55AM 15 NOT RESPONSIBLE FOR SUBPOENA COMPLIANCE.

11:56AM 16 WE RESPECTFULLY REQUEST THE OPPORTUNITY TO PRESENT TO THE

11:56AM 17 COURT IN CAMERA A STATEMENT TO THIS EFFECT SO THE COURT

11:56AM 18 UNDERSTANDS WHAT MS. HOLMES DID OR DID NOT OR HAVE ACCESS TO AT

11:56AM 19 THE RELEVANT TIME. WE THINK THAT THE INFORMATION IS

11:56AM 20 PRIVILEGED, BUT IT'S RELEVANT TO SOME OF THE COURT'S QUESTIONS,

11:56AM 21 AND WE WOULD RESPECT THE OPPORTUNITY TO PRESENT AN IN CAMERA

11:56AM 22 SUBMISSION TO THE COURT ON THAT ISSUE.

11:56AM 23 I'LL JUST CLOSE ON THE ISSUE OF PREJUDICE. IT IS -- THE

11:56AM 24 LACK OF ACCESS TO THE DATABASE IS PREJUDICIAL BOTH WITH RESPECT

11:56AM 25 TO INDIVIDUAL TEST RESULTS AND MORE GENERALLY.

11:56AM 1 WITH RESPECT TO THE INDIVIDUAL TEST RESULTS, THERE IS  
11:56AM 2 SIGNIFICANT INFORMATION THAT WE CAN LEARN ABOUT THOSE  
11:56AM 3 INDIVIDUAL TEST RESULTS FROM THE DATABASE. EVEN IF YOU CAN'T,  
11:56AM 4 YOU KNOW, YOU CAN'T LOOK AT THE DATABASE FOR SURE AND KNOW IF  
11:57AM 5 SOMEONE WAS ACTUALLY PREGNANT OR NOT, BUT AS I SAID, THERE'S  
11:57AM 6 INFORMATION IN THE DATABASE THAT GOES TO WHETHER WHAT MIGHT  
11:57AM 7 HAVE CAUSED AN INACCURATE TEST RESULT.  
11:57AM 8 AND WE COULD TAKE THE MULTITUDE OF DATA IN THAT DATABASE  
11:57AM 9 AND PUT THAT INDIVIDUAL RESULT IN CONTEXT, YOU KNOW, HOW MANY  
11:57AM 10 OF THESE WERE OUT OF WHACK?  
11:57AM 11 YOU KNOW, THE GOVERNMENT'S DOCTOR EXPERTS HAVE SAID THAT  
11:57AM 12 THESE RESULTS IN MANY CASES WERE OBVIOUS ERRORS TO THEM.  
11:57AM 13 WELL, HOW MANY OTHER OBVIOUS ERRORS ARE THERE IN THE  
11:57AM 14 DATABASE? ARE THERE A LOT? ARE THERE NONE? IS THERE ONE OF,  
11:57AM 15 YOU KNOW, HUNDREDS OF THOUSANDS OF SUCH RESULTS AND THIS IS  
11:57AM 16 JUST ONE OF THEM? THAT WOULD BE VERY PROBATIVE, AND WE DON'T  
11:57AM 17 HAVE ACCESS TO THAT.  
11:57AM 18 AND IT'S NOT SPECULATION FOR US TO SAY THAT THERE IS  
11:57AM 19 EXONERATORY VALUE TO THE DATABASE, AND THAT'S THE LANGUAGE THAT  
11:57AM 20 THE COURTS USED IN DETERMINING WHETHER TO SUPPRESS EVIDENCE,  
11:57AM 21 WHETHER THERE IS POTENTIAL EXONERATORY VALUE, AND WHETHER THE  
11:58AM 22 GOVERNMENT KNEW THAT AT THE RELEVANT TIME.  
11:58AM 23 AND THERE'S NO QUESTION THAT THERE ARE MANY, MANY, MANY  
11:58AM 24 MILLIONS OF ACCURATE TEST RESULTS IN THAT DATABASE THAT SHOW  
11:58AM 25 THAT THERANOS WAS GENERATING ACCURATE AND RELIABLE TEST RESULTS

11:58AM 1 ACROSS A VERY BROAD RANGE OF TESTS AND ALL OF THAT IS HIGHLY  
11:58AM 2 EXCULPATORY BOTH ON THE QUESTION OF FALSITY BUT ALSO WITH  
11:58AM 3 RESPECT TO MS. HOLMES'S INTENT.

11:58AM 4 SO WITH THAT WE URGE THE COURT TO SET THIS MOTION FOR A  
11:58AM 5 HEARING AND SEPARATELY I URGE THE COURT TO GRANT OUR MOTION TO  
11:58AM 6 COMPEL.

11:58AM 7 THE COURT: ALL RIGHT. THANK YOU VERY MUCH,  
11:58AM 8 MS. SAHARIA.

11:58AM 9 MR. BOSTIC, MS. SAHARIA GETS THE LAST WORD, BUT IS THERE  
11:58AM 10 ANYTHING YOU WANT TO SAY? AND IF THERE IS, I'LL GIVE  
11:58AM 11 MS. SAHARIA THE LAST WORD.

11:58AM 12 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:58AM 13 JUST ON THAT LAST POINT ABOUT THE PREJUDICE TO THE DEFENSE  
11:58AM 14 AND THE EXCULPATORY NATURE OR ARGUABLE EXCULPATORY NATURE OF  
11:58AM 15 THIS DATA. I WOULD REFER THE COURT TO THE FLYER DECISION AND  
11:59AM 16 THE ROBERTSON DECISION.

11:59AM 17 SO FLYER REJECTED THAT DEFENDANT'S SUPPRESSION ARGUMENTS  
11:59AM 18 PARTLY BECAUSE THAT DEFENDANT DIDN'T SHOW THAT THE LOSS OF  
11:59AM 19 EVIDENCE PREJUDICED HIM. IN THAT CASE THE LOSS OF ELECTRONIC  
11:59AM 20 INFORMATION MEANT THAT IT WAS ACTUALLY MORE DIFFICULT FOR THE  
11:59AM 21 GOVERNMENT TO PROVE SUCCESSFUL DOWNLOADS OF THE INCRIMINATING  
11:59AM 22 MATERIAL IN THAT CASE.

11:59AM 23 THE COURT: BUT THE GOVERNMENT DISMISSED THE ONE  
11:59AM 24 COUNT THAT INVOLVED -- WAS INVOLVED IN THIS CASE IF I RECALL  
11:59AM 25 CORRECTLY.

11:59AM 1 MR. BOSTIC: CORRECT, YOUR HONOR.

11:59AM 2 BUT THE DEFENDANT IN THAT CASE WANTED ADDITIONAL

11:59AM 3 SUPPRESSION THAT THE COURT DENIED ON THE BASIS THAT THERE WAS

11:59AM 4 AN INSUFFICIENT SHOWING THAT THE PREJUDICE WAS ACTUALLY APPLIED

11:59AM 5 TO THE DEFENDANT HIMSELF AS OPPOSED TO THE GOVERNMENT.

11:59AM 6 AND HERE WHEN WE'RE TALKING ABOUT CONTEXTUAL INFORMATION

11:59AM 7 SURROUNDING INDIVIDUAL PATIENT RESULTS, THERE'S EVERY REASON TO

11:59AM 8 BELIEVE THAT THE LACK OF THAT INFORMATION PUTS THE GOVERNMENT

11:59AM 9 AT A DISADVANTAGE ALSO SO THAT THE DEFENSE OBVIOUSLY CAN -- YOU

12:00PM 10 KNOW, IS AWARE OF THAT. BUT THIS IS NOT PREJUDICE UNIQUE TO

12:00PM 11 THE DEFENDANT. IT IS NOT THE KIND OF PREJUDICE THAT SUPPORTS A

12:00PM 12 FINDING OF SANCTIONS BEING WARRANTED UNDER LOUD HAWK.

12:00PM 13 ROBERTSON SIMILARLY DECLINES TO ISSUE A REMEDIAL JURY

12:00PM 14 INSTRUCTION UNDER LOUD HAWK PARTLY BECAUSE THAT COURT FOUND

12:00PM 15 THAT THE EXONERATOR VALUE OF THE EVIDENCE IN THAT CASE WAS NOT

12:00PM 16 APPARENT.

12:00PM 17 SO HERE WHEN THE DEFENSE TALKS ABOUT HOW MANY ACCURATE

12:00PM 18 RESULTS THE LIS WOULD HAVE CONTAINED OR EVEN ASSUMES THAT IT

12:00PM 19 WOULD BE POSSIBLE TO IDENTIFY WHICH RESULTS WERE ACCURATE IN

12:00PM 20 THE LIS, THAT IS SPECULATION. IT'S THE KIND OF SPECULATION

12:00PM 21 THAT THE COURT CAN'T RELY ON IN AN ANALYSIS LIKE THIS.

12:00PM 22 AND IN ROBERTSON THE COURT HAD PREVIOUSLY FOUND THAT IT

12:00PM 23 WAS COMPLETELY SPECULATIVE WHETHER THE VIDEO THAT WAS LOST IN

12:00PM 24 THAT CASE WAS POTENTIALLY USEFUL TO THE DEFENSE AND THE SAME IS

12:00PM 25 TRUE HERE.

12:00PM 1 NOT ONLY HERE ARE WE FACING SPECULATION ABOUT THE NATURE  
12:01PM 2 OF THE DATA IN THE LIS, SPECULATION WHICH IS CONTRARY TO WHAT  
12:01PM 3 WITNESSES HAVE TOLD US AND WHAT OTHER DATA SHOWS, BUT WE'RE  
12:01PM 4 ALSO FACING ANOTHER LAYER OF SPECULATION ABOUT WHETHER THAT  
12:01PM 5 EVIDENCE WAS TRULY IN EXISTENCE AFTER THE ORIGINAL COPY OF THE  
12:01PM 6 DATABASE WAS DISASSEMBLED IN AUGUST OF 2018. SO WE HAVE  
12:01PM 7 MULTIPLE LAYERS OF SPECULATION HERE COMPOUNDING EACH OTHER.  
12:01PM 8 NOT ONLY CAN THE DEFENSE NOT SHOW THAT THIS EVIDENCE WOULD  
12:01PM 9 HAVE BEEN EXONERATORY, IT CAN'T EVEN SHOW THAT THE EVIDENCE WAS  
12:01PM 10 ACCESSIBLE OR EXTANT POST AUGUST 2018.  
12:01PM 11 THE COURT: ALL RIGHT. THANK YOU.  
12:01PM 12 MS. SAHARIA. AND THIS IS THE FINAL WORD, MS. SAHARIA.  
12:01PM 13 MS. SAHARIA: FINAL WORD.  
12:01PM 14 SO WITH RESPECT TO THE FLYER CASE, THE COURT HELD THERE  
12:01PM 15 WAS NO EVIDENCE OF PREJUDICE TO THE DEFENDANT BECAUSE HE HAD  
12:01PM 16 ADMITTED TO THE AGENTS THAT CAME TO SEIZE HIS COMPUTER THAT HE  
12:01PM 17 HAD DOWNLOADED THE PORN, SO THE FACT THAT THE COMPUTER WAS NOT  
12:02PM 18 AVAILABLE TO HIM WAS NOT EXONERATORY. SO THAT'S NEITHER HERE  
12:02PM 19 NOR THERE WITH RESPECT TO THIS CASE.  
12:02PM 20 WITH RESPECT TO THE ROBERTSON CASE, THE COURT DID HOLD AN  
12:02PM 21 EVIDENTIARY HEARING, AND IT WAS AFTER ALL OF THE EVIDENCE CAME  
12:02PM 22 OUT AT THAT HEARING ABOUT WHAT THE VIDEO CAMERA SHOWED OR  
12:02PM 23 DIDN'T SHOW AND WHICH WAY IT WAS POINTED AND THE FACT THAT IT  
12:02PM 24 WAS ACTUALLY NOT EVEN -- THE VIEW OF THE CAR AT ISSUE WAS  
12:02PM 25 OBSTRUCTED, ALL OF THAT EVIDENCE CAME OUT AT A HEARING AND ON

12:02PM 1 THE BASIS OF THAT EVIDENCE THE COURT CONCLUDED THAT THE  
12:02PM 2 EXCULPATORY NATURE OF THE EVIDENCE WAS SPECULATIVE, AND,  
12:02PM 3 THEREFORE, THERE WAS MINIMAL PREJUDICE.

12:02PM 4 I WILL NOTE THAT IN THAT CASE THE COURT ALSO RELIED ON THE  
12:02PM 5 FACT THAT THE FAILURE TO PRESERVE THE EVIDENCE WAS DUE TO  
12:02PM 6 ROUTINE OPERATION OF THE POSTAL SERVICE AND THAT THE  
12:02PM 7 PROSECUTORS WERE NOT INVOLVED. THIS IS A VERY DIFFERENT  
12:02PM 8 SITUATION THAN ROBERTSON.

12:02PM 9 WE ARE NOT SPECULATING. WE HAVE OFFERED THE COURT  
12:03PM 10 EVIDENCE FROM WITNESSES INTERVIEWED BY THE GOVERNMENT THAT THE  
12:03PM 11 DATABASE COULD HAVE THEN USED IF IT HAD BEEN PUT BACK TOGETHER  
12:03PM 12 IN A TIMELY FASHION.

12:03PM 13 THE GOVERNMENT DOESN'T WANT TO BELIEVE THAT EVIDENCE, BUT  
12:03PM 14 THAT'S EXACTLY WHY AN EVIDENTIARY HEARING IS REQUIRED SO THE  
12:03PM 15 COURT CAN HEAR THAT EVIDENCE FIRSTHAND AND MAKE FINDINGS OF  
12:03PM 16 FACT BASED ON THAT EVIDENCE.

12:03PM 17 THE GOVERNMENT WAS WELL AWARE THAT THIS WAS -- THIS WOULD  
12:03PM 18 BE A COMPLEX DATABASE WHICH USED AND IT WAS PUT ON NOTICE OF  
12:03PM 19 THAT FACT IN MAY. WE DON'T DISPUTE THAT THIS IS A COMPLEX  
12:03PM 20 DATABASE. IT CERTAINLY WAS. THE GOVERNMENT HAD PLENTY OF  
12:03PM 21 NOTICE OF THE STEPS THAT IT COULD HAVE TAKEN TO BE ABLE TO USE  
12:03PM 22 DATABASE, AND IT DIDN'T TAKE ANY OF THOSE STEPS. THIS IS ALL  
12:03PM 23 RELEVANT EVIDENCE THAT THE COURT SHOULD HEAR AT A HEARING.

12:03PM 24 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK  
12:03PM 25 YOU.

12:03PM 1 AS I INDICATED AT THE OUTSET, I'M GOING TO REVIEW ALL OF  
12:04PM 2 YOUR COMMENTS AND REVIEW, ONCE AGAIN, THE PAPERS AND THE COURT  
12:04PM 3 WILL TAKE THE MOTION UNDER SUBMISSION, AND I'LL ISSUE AN ORDER  
12:04PM 4 SHORTLY THAT WILL HAVE THE COURT'S FINDINGS AND RULING ON THE  
12:04PM 5 MOTION AND ON THE REQUESTS FOR A HEARING AND OTHER INFORMATION.  
12:04PM 6 ANYTHING FURTHER BEFORE WE CLOSE TODAY?  
12:04PM 7 MS. SAHARIA: YOUR HONOR, I THINK MR. DOWNEY WOULD  
12:04PM 8 LIKE TO ADDRESS A FEW -- ONE OR MORE ISSUES RELATING TO  
12:04PM 9 PRETRIAL ISSUES.  
12:04PM 10 THE COURT: OKAY.  
12:04PM 11 MR. DOWNEY: JUST A HOUSEKEEPING QUESTION. I DON'T  
12:04PM 12 THINK WE'RE SCHEDULED TO BE TOGETHER BEFORE THE QUESTIONNAIRE  
12:04PM 13 WILL GO OUT. AND HAS THE COURT FINALIZED THAT? AND IS THERE  
12:04PM 14 ANYTHING THAT THE COURT NEEDS FURTHER FROM THE PARTIES ON THAT?  
12:04PM 15 THE COURT: I DO NOT NEED ANYTHING FURTHER FROM YOU.  
12:04PM 16 AND YOU'LL GET THE COURT'S FINAL QUESTIONNAIRE SHORTLY.  
12:04PM 17 MR. DOWNEY: GOOD. THANK YOU, YOUR HONOR.  
12:04PM 18 AND THE OTHER QUESTION WAS JUST I KNOW YOUR HONOR HAD  
12:04PM 19 MENTIONED THAT AT SOME TIME PRIOR TO THE 31ST WE MIGHT GET  
12:04PM 20 TOGETHER.  
12:04PM 21 I ASSUME THE COURT WILL SET THAT DATE IN THE FUTURE, BUT I  
12:05PM 22 JUST WANTED TO ASK IF THE COURT WANTS TO SET IT NOW.  
12:05PM 23 THE COURT: WELL, I'M HAPPY TO -- I DO THINK IT'S  
12:05PM 24 IMPORTANT THAT WE DO GET TOGETHER, ALL OF US, AT SOME POINT IN  
12:05PM 25 TIME, AND I WAS GOING TO LEAVE IT TO YOU TO SCHEDULE YOUR

12:05PM 1 SCHEDULES TO MEET AND CONFER AND SEE WHAT WORKS FOR ALL OF YOUR  
12:05PM 2 TEAMS.

12:05PM 3 MR. DOWNEY: WE'LL DO THAT, YOUR HONOR.

12:05PM 4 THE COURT: BUT I'M HAPPY TO HAVE YOU IN HERE IN THE  
12:05PM 5 COURT.

12:05PM 6 I CAN TELL YOU THAT, AS YOU PROBABLY READ, WE'RE STARTING  
12:05PM 7 TO RELAX THINGS. OUR COURT HAS GIVEN US -- WE HAVE DECIDED TO  
12:05PM 8 ALLOW EACH JUDGE THE DISCRETION AS TO WHETHER OR NOT TO TAKE  
12:05PM 9 THE PLEXIGLASS DOWN THAT'S IN THE COURTROOM, AND YOU'VE HEARD  
12:05PM 10 ME SPEAK ABOUT MY FONDNESS OF THE PLEXIGLASS IN THE COURTROOM.

12:05PM 11 I HAVEN'T ASKED IT TO BE REMOVED JUST YET. IN THE SPIRIT  
12:05PM 12 OF FULL DISCLOSURE, I'M CONSULTING WITH MY STAFF ALSO TO SEE  
12:06PM 13 WHAT THEIR COMFORT LEVEL IS AS WELL BEFORE I MAKE ANY FINAL  
12:06PM 14 DECISIONS, AND I'M HAPPY TO HEAR FROM YOU AS WELL ABOUT THAT,  
12:06PM 15 TOO, THAT IS, BOTH SIDES, ABOUT YOUR CONCERNS, IF ANY, ABOUT  
12:06PM 16 WHETHER OR NOT PLEXIGLASS SHOULD STAY IN PLACE AND WHAT YOUR  
12:06PM 17 THOUGHTS ARE, AND, IF SO, IN WHAT CAPACITY. THAT MIGHT BENEFIT  
12:06PM 18 YOU AND YOUR WITNESSES AND ALL OF THE PARTIES.

12:06PM 19 SO YOU CAN LET ME KNOW THAT, TOO.

12:06PM 20 BUT, YES, I'D LIKE YOU TO MEET AND CONFER AND WORK WITH  
12:06PM 21 MS. KRATZMANN AND SEE IF WE CAN GET AN AGREEABLE DATE WHEN WE  
12:06PM 22 CAN ALL GET TOGETHER.

12:06PM 23 MR. DOWNEY: FAIR ENOUGH, YOUR HONOR. UNDERSTOOD,  
12:06PM 24 YOUR HONOR.

12:06PM 25 THE COURT: OKAY. GREAT. THANK YOU.

12:06PM 1 THEN LET ME JUST EXTEND OUR BEST WISHES TO EVERYONE IN  
12:06PM 2 FUTURE ENDEAVORS, AND WE HOPE THE BEST AND EXTEND OUR GOOD WILL  
12:06PM 3 TO ALL OF YOU, AND WE LOOK FORWARD TO SEEING YOU AGAIN ALL  
12:07PM 4 HEALTHY, AND I LOOK FORWARD TO HAVING YOU ALL IN THE COURTROOM  
12:07PM 5 AGAIN.

12:07PM 6 SO BEST WISHES. THANK YOU.

12:07PM 7 MS. SAHARIA: THANK YOU, YOUR HONOR.

12:07PM 8 MR. BOSTIC: THANKS VERY MUCH.

12:07PM 9 MR. WADE: THANK YOU, YOUR HONOR.

12:07PM 10 THE CLERK: COURT IS ADJOURNED. THIS WEBINAR SHALL  
12:07PM 11 TERMINATE.

12 (COURT CONCLUDED AT 12:07 P.M.)

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3 CERTIFICATE OF REPORTER  
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6

7 I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED  
8 STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,  
9 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
10 CERTIFY:

11 THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS  
12 A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE  
13 ABOVE-ENTITLED MATTER.

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IRENE RODRIGUEZ, CSR, RMR, CRR  
17 CERTIFICATE NUMBER 8074  
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19 DATED: JULY 9, 2021  
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